Ellwood L. Leuschner, Sr.
Petitioner

v.

State of Maryland
Respondant

In the Supreme Court of the United States

80-5084

Docket No. _____

RECEIVED
JUL 17 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioner, Ellwood L. Leuschner, Sr., In Pro Se and in Forma Pauperis, and petitions this honorable court to issue a Writ of Certiorari on the Court of Special Appeals of Maryland to review that court's decision in Leuschner v. State, No. 945, September term 1979, Filed: April 14, 1980 (Reported).

QUESTIONS PRESENTED

I. Did the trial court err in admitting into evidence numerous inculpatory statements made by Petitioner.
   (a) Implicitly ruling that they were voluntary,
   (b) Ruling that they were made in compliance with Miranda,
   (c) Overlooking the question of whether they were the product of an illegal arrest.

II. Did the trial court err in sentencing Petitioner to life without parole?

III. Did the trial court err in permitting Sgt. Griffith to testify as to statements made by Petitioner?

CONSTITUTIONAL PROVISIONS

United States Constitution:

Amendment V.

> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;....

Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...; to be confronted by the witnesses against him...; and to have the assistance of counsel for his defense.

United States Constitution:

Amendment XIV.

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Declaration of Rights:

Article 21

> That in all criminal prosecutions, every man hath a right to be informed of the accusation against him...; to be allowed counsel; to be confronted with the witnesses against him...; and to a speedy trial by an impartial jury.

Article 22

> That no man ought to be compelled to give evidence against himself in a criminal case.

Article 23

> That no man ought to be taken or imprisoned ...or deprived of his life, liberty, or property, but by the judgement of his peers, or by the law of the land.

Maryland Annotated Code, Article 27, Sec. 643B:

Section 643B. Mandatory sentence for crimes of violence.

> (a) "Crime of Violence"--As used in this section, the term "crime of violence" means abduction, arson, kidnapping, manslaughter, except involuntery manslaughter: mayhem, murder, rape, robbery, sexual offenses in the first degree, sexual offenses in the second degree, use of a handgun in the commission of a felony or other crime of violence, an attempt to commit any of the aforesaid offenses, assualt with intent to murder, and assualt with intent to rape.
> The term "correctional institution" includes Patuxent Institution and a local or regional jail or detention center.
> (b) Mandatory life sentence--Any person who has served three seperate terms of confinement in a correctional institution as a result of three seperate convictions of any crime of violence shall be sentenced, on being convicted a fourth time of a crime of violence, to life imprisonment without possibility of parole. Regardless of any other law to the contrary, the provisions of this section are mandatory.
> (c) Third conviction of crime of violence--Any person who (1) has been convicted on two seperate occasions of a crime of violence where the convictions do not arise from a single incident, and (2) has served at least one term of confinement in a correctional institution as a result of a conviction of a crime of violence, shall be sentenced, on being convicted a third time of a crime of violence, to imprisonment for the term allowed by law, but, in any event, not less than 25 years. Neither the sentence nor any part of it may be suspended, and the person shall not be eligible for

parole except in accordance with the provisions of Article 31B, Section 11.
(d) Compliance with Maryland Rules--If the State intends to proceed against a person as a subsequent offender under this section, it shall comply with the procedures set forth in the Maryland Rules for the indictment and trial of a subsequent offender.

Maryland Annotated Code, Article 41, Section 28A:

> The arrest of a person may be lawfully made by any peace officer without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or district court commissioner with all practicable speed and compliant made against him under oath setting forth the ground for arrest as in the preceeding section (Section 28) and therefore his answer shall be heard as if he had been arrested on a warrant.

STATEMENT OF THE CASE

Petitioner, Ellwood L. Leuschner, Sr., was charged by indictment on November 16, 1977, in Wicomico County with murder, forcible kidnapping, fraudulent kidnapping, sodomy, and commission of a first degree sex offense, all pertaining to Troy William Krause. Petitioner was also charged in that indictment with certain offenses pertaining to William Russell Marine, Jr. To all of the charges, Petitioner entered pleas of not guilty and not guilty by reason of insanity. The case was removed to Garrett County on December 29, 1977, and on June 19, 1978, the charges relating to William Russell Marine, Jr., were severed from those relating to Troy William Krause. Trial proceeded on the former charges in Garrett County from June 19 through 26, 1978. At the conclusion of those proceedings, the remaining charges were removed to Washington County on August 22, 1978.

On June 18, 19, 20, 21, 1979, Petitioner was tried by a jury in the Circuit Court for Washington County (the Honorable John P. Corderman presiding) on the charges related to Troy Krause. The jury returned guilty verdicts on four charges (acquitting on the charge of forcible kidnapping) and found that Petitioner was sane at the time of the acts alleged. The court merged all of the convictions for purposes of sentencing, and imposed upon Petitioner a sentence of life imprisonment without possibility of parole, pursuant to Maryland Annotated Code Art. 27, Section 643B.

On June 28, 1979, appeal to the Special Court of Appeals of Maryland was noted.

STATEMENT OF FACTS

On four successive days while he was in custody, Petitioner made numerous verbal inculpatory statements which were introduced at his trial. Additionally, Petitioner made one statement (written) that was not introduced at trial.

The State's case on the motion was presented mainly through the testimony of Maryland State Police troopers and Betty Larmore, girlfriend of Petitioner at the time of his arrest.

October 29, 1977 (Saturday)

Rusty Marine, a ten year old boy, disappeared from the trailer park in which he resided. (Ta. 23-24)[1] In investigating his disappearance, the police learned that Petitioner, who lived with Betty Larmore in the same trailer park, had been the last one to see him alive. (Ta. 25)

October 30, 1977 (Sunday)

In the early morning hours, Sgt. Luce interviewed Petitioner who acknowledged that he had seen Rusty. (Ta. 28-30). Later that day, through the NCIC computer, the police learned that Petitioner was wanted in California for a parole violation. At 12:30 P.M. Luce and Sgt. Chaffey arrested Petitioner on the fugitive charge. (Ta. 31-32). He was read his Miranda rights, taken to the barracks, and at 1:15 P.M. was readvised of his Miranda rights, and refused to execute a waiver of them. (Ta. 33).

Petitioner requested an attorney on the fugitive charges. Nothing was done about that request; instead Petitioner was routinely processed and, at 2:00 P.M. Officers Luce and Chaffey questioned him about Rusty Marine. The officers stated that Petitioner again requested counsel for the fugitive charges, and indicated that he did not need an attorney for the purpose of being questioned about Marine. (Ta. 34). He was questioned for two hours as to his activities on the 29th, and although he made no incriminating statements, there were "discrepancies" in his story.(Ta 35)

During this time, at 2:30 P.M., Betty Larmore came in. Petitioner told her to get him an attorney, which she said she could not do because it was Sunday. Questioning continued until 4:00 P.M. (Ta. 36-37); at its conclusion, Luce bought Petitioner a pack of cigarettes. (Ta. 45).

From 4:00 to 6:00 or 6:30 P.M., Petitioner was given a sandwich and was questioned by Lt. Keating and Trooper Hall. (Ta. 87,244).

---

1. Transcript reference "(Ta)" are to the volume dated June 18, 19, 1979, which consists entirely of the hearing on the motion to suppress.

At the outset, Hall again advised him of his Miranda rights.(Ta.87)in regards to the Marine issue. It was noted in Hall's report that:

> "Petitioner...stated several times that he wanted to talk to someone that he could trust and that he needed a lawyer. He was advised he could contact a private lawyer, or, if he was formally charged, one would be afforded him by the Public Defenders office." (Ta. 245-46)

According to Keating, an hour into the questioning, he gave Petitione a telephone and directory, but Petitioner made no attempt to use them. (Ta. 88-89). Finally, he called Betty; when she arrived, he again asked her to get an attorney. (Ta. 89-90). Keating did not recall her response, but she left and the questioning continued. (Ta. 90). The session included some general conversation. (Ta. 93), and again Petitioner did not make any incriminating statements. (ta. 92).

Next, from 7:00 to 7:30 P.M., Petitioner was again questioned by Sgt. Luce and Hall. (Ta. 46). From 7:30 to 8:30 P.M., he was questioned by Trooper Hornung, Bacon, and Pollack. (Ta. 47). During this period, Hornung asked Petitioner to take a polygraph test, which he refused to do without consulting an attorney. (Ta. 179). From 8:30 to 9:00, Petitioner was again questioned by Luce and Hall. (Ta. 46), and from 9:00 to 9:30, Hornung questioned him. (Ta. 180). Thereafter, Petitioner was taken before a district court commissioner for charging on the fugitive charge.(Ta. 132)

He was held without bond and read his rights. Petitioner requested a public defender form, but did not request that a lawyer at that time be present. (Ta. 134-35). He spent the night in the county jail.

October 31, 1977 (Monday)

The next morning at around 9:00 a.m., Petitioner was brought back to the barracks and was advised of his rights by Keating and Hall, who again proceeded to question him. No request for an attorney was made at this time. (Ta. 94-95). Early in the afternoon, Petitioner was taken to the area where the boy's body was found. After viewing the body, Petitioner was taken back to the barracks and on the way, according to the police, he requested that Betty be brought to the barracks. She arrived there shortly after they did. (Ta. 98). When Betty came into the room, Petitioner told her that "he had taken Rusty"; Hall and Keating were present. Petitioner spoke for five minutes, then signed a waiver of his rights at 4:00 P.M.

At 7:30 P.M. that night, Keating began to question Petitioner about Troy Krause. (Ta. 101). He denied any knowledge of the boy and asked to se Betty. While she was there, in Keating's presence, Petitioner said words to the effect of "I took him, too" and described what happened.(Ta.103-04)

Petitioner stated that he did not know if the boy was dead or alive and agreed to help the police locate the body. (Ta. 103-04). They found nothing in the subsequent search and Petitioner was returned to the jail at 11:00 p.m. to the custody of Luce and Chaffey. (Ta. 59). Petitioner was charged with the murder of Rusty Marine at 12:10 a.m. November 1, and was taken before district court commissioner Eliot, who declined to set bond (Ta. 59-60).

November 1, 1977 (Tuesday)

The next morning, at 8:00 a.m., Officers Keating and Lewis, along with Betty Jean, picked up Petitioner at the jail and continued to search for the body of Troy Krause, again with no success. (Ta. 105-06). The day befor Keating asked Petitioner if he would take a polygraph test, and Petitioner decided on the 1st that he would like to take the test to see if it would assist him and help, and he wanted to locate the missing boy. (Ta. 106).

Trooper Harold Gray joined the investigation that morning and read the Miranda warnings to Petitioner. (Ta. 196-97). They continued to search, and later in the day, he and Lewis took Petitioner to Easton for the polygraph conducted by Sgt. Griffith. (Ta. 201). At 4:05 p.m., Petitioner was taken to District court where Judge Dallas presided over a bond review. Judge Dallas advised Petitioner of his rights and "advised him not to talk to the police or anyone about this." (Ta. 202).

November 2, 1977 (Wednesday)

Petitioner was taken back to Easton to continue the polygraph where he advised Sgt. Griffith that "he wished to clear this matter up; he wished to help locate the body of Troy Krause." (Ta. 242). Petitioner again tried during the interview to recall where he had buried the body. (Ta.204).

They left Easton around 8:30 p.m., and on the way home, Petitioner told Betty where he had buried the boy. Betty relayed this information to Trooper Bacon. (Ta. 218).

November 3, 1977 (Thursday)

Officers Bacon and Gray went to the location given to Betty on the Zimmerman farm. Petitioner was brought out by Hall, Tunney, and Hornung. (Ta. 206). At 10:30 that morning the body was found. At 2:30 p/m. an arrest warrant was obtained by Sgt. Luce and served on Petitioner in the presence of his attorney, Patrick Rogan. Shortly thereafter, he was presented to District court Judge Truitt. (Ta. 64).

Betty Larmore's testimony substantially corroborated that of the State police as to the main events, with some additional detail. As to Petitioner initial request for an attorney on October 30, she stated that Petitioner told her that "(the police) said that they would get him a lawyer if he tok

a lie detector test." (Ta. 163). She asked Petitioner about taking a lie detector test, and he said, "No, they got me in trouble once, I'm not taking one...get me a lawyer and them I'll take one. (Ta. 161, 163). He asked her to get him a lawyer several times. She attempted to get one, but was unable to do so.

She stated that the had asked her to help them to get Petitioner to confess and to take a lie detector test. (Ta. 167-68).

Petitioner's testimony contradicted much of the State's case, but his testimony was discounted as not being credible. (Ta. 359-60,363).

TRIAL

Troy Krause's family, residents of the trailer park, testified as to his disappearance on July 28, 1977. Diane Krause, his mother said he left home in the morning on a bicycle to go to the YMCA. (Tb. 12)[2] When he was not home by late afternoon, they called the police and started looking for him. (Tb. 15). At midnight, his brother Michael found the bicycle 200 to 300 yards from the house, behind a mound of dirt. (Tb. 22).

Trooper Phillip Andrews and Sgt. Chaffey testified as to the initial investigation, which included numerous foot searches during a two week period. (Tb. 38)., and continued investigation up until October 29, which produced no information as to the boy's disappearance.

Joseph Zimmerman, Petitioner's brother-in-law, testified that Petitioner had lived and worked on his farm from February 1975 to February 1877, and, thereafter, went to work and live elsewhere., though he maintained access to Zimmerman's pickup truck. (Tb. 40-42) Zimmerman could not recall if the Petitioner had used the truck on July 28, 1977.

Betty Larmore and Petitioner began to live together in her sister's house in July of 1977. (Tb. 44). In late July, they went to the trailer park to inquire about renting a trailer. (Tb. 45). The next day, she went to work and Petitioner borrowed her car to go back to the trailer park again. (Tb. 46-47).

On October 31, 1977, she had gone to the State Police barracks, where Petitioner was in custody. She spoke with him and he told her that he had picked up Troy in the truck, had taken him into the woods, twisted his tee shirt around his neck and left him there. (Tb. 49-51). On November 2, the Petitioner told her that he had suddenly remembered where he had buried the boy, and told her to report that to Trooper Bacon. (Tb. 55).

---

2. Transcript references "(Tb)" are to the transcript dated June 19, 20, 21, 1979.

Trooper Hornung, Lt. Keating, Sgt. Griffith, Trooper Bacon, and Trooper Gray testified substantially as to the same series of events as had been presented on the motion, omitting references to the Rusty Marine incident. (Tb. 60-98). Each one testified as to specific inculpatory statements made by Petitioner at various times. Lt. Keating testified as to Petitioner's initial confession on October 31, which was substantially similar to the one testified to by Betty, with the addition that he had had sex with Troy before leaving him in the woods. (Tb. 69070).

Sgt. Griffith testified as to his polygraph interview with Petitioner on November 1, wherein Petitioner again confessed several times to having taken Troy. (Tb. 76-78). Trooper Bacon testified that on November 3, the Petitioner pointed out the location where the boy's body was found on the Zimmerman farm. (Tb. 84-85). Trooper Gray testified as to his interview with Petitioner on November 1 and 2 during which inculpatory statements were made. (Tb. 89-92).

Hormez Guard, Assistant State Medical Examiner, testified as to the autopsy which he performed on the body found. (Tb. 109-11). Dr. Guard determined that the cause of death was strangulation, and noted that there was evidence of stab wounds, and that the condition of the anus indicated that it had been forcibly opened. (Tb. 112-13).

Ralph Brumley, owner of the trailer park, testified from his records that Betty Larmore had visited the trailer park on July 27, 1977 (Tb. 131).

At the conclusion of the State's case, a motion for judgement of acquittal was made and denied. (Tb. 137-38).

ISSUE OF INSANITY

The defense called Dr. John Henderson, a forensic psychiatrist, who had examined Petitioner on two occasions, in December 1977 and May 1978, for a total of eight and a half hours. A psychiatric history was taken and a mental status exam was performed. (Tb. 145-46). Additionally, Henderson spent 40 to 50 hours reading records about Petitioner. (Tb. 159-66). His diagnosis was that Petitioner was suffering from a mental disorder and was insane at the time of the offenses. (Tb. 181).

Dr. William N. Fitzpatrick, a consultant forensic psychaitrist at Perkins State Hospital, was called by the State. (Tb. 222). Dr. Fitzpatrick was not present at the medical conferance that evaluated Petitioner(Tb.225)

He interviewed Petitioner for one hour in February, and talked with the psychologist and social worker there as to their workup on Petitioner. (Tb. 226). His opinion was that Petitioner was sane at the time that the crimes were comitted. (Tb. 233).

CITATIONS

Akonom v. State, 40 Md. App. 676 (1978)
Ashcraft v. Tennessee, 332 U.S. 143 (1944)
Bram v. United States, 168 U.S. 532 (1897)
Brewer v. Williams, 430 U.S. 387 (1977)
Brookhart v. Janis, 384 U.S. 1, 16 L.Ed. 2d. 286, 292 (1979)
Brown v. Illinois, 422 U.S. 590 (1975)
Brown v. State, 10 Md. App. 462, 472-73, (1970)
Canal Zone v. Gomez, 566 F. 2d. 1289, 1291 (5th Cir. 1978)
Clewis v. Texas, 386 U.S. 207, 87 S.Ct. 1338, 18 L.Ed.2d. 422 (1967)
Doyle v. Ohio, 426 U.S. 610, 617-18 (1976)
Gavazos v. State, 172 S.W. 2d. 348 (Texas 1943)
Harris v. South Carolina, 338 U.S. 68 (1949)
Hill v. State, 218 Md. 120 (1958)
Hoffa v. United States, 385 U.S. 293 (1966)
Jackson v. Denno, 378 U.S. 368, 376 (1964)
Johnson v. State, 31 Md. App. 303, 355A. 2d. 504 (1976)
Keller v. State, 2 Md. App. 623, 236 A. 2d. 313 (1967)
Kirby v. Illinois, 406 U.S. 682, 689 (1972)
Leyra v. Denno, 347 U.S. 556 (1954)
Merritt v. State, 221 Md. 118 (1959)
Michigan v. Mosley, 423 U.S. 96 (1975)
Miller v. Pate, 386 U.S. 1, 17 L.Ed. 2d. 690, 87 S.Ct. 785 (1967)
Mincey v. Arizona, 96 S.Ct. 2408, 2416 (1978)
Miranda v. Arizona, 384 U.S. 436 (1966)
North Carolina v. Butler, __U.S.__, 60 L.Ed. 2d. 286, 292 (1979)
Payne v. Arkansas, 356 U.S. 560, (1958)
Smith v, State, 20 Md. App. 577, 587 (1974)
State v. Crittenden, 36 So. 2d. 645 (La. 1948)
State v. Fabritz, 276 Md. 416, 421-22, 348 A. 2d. 275 (1975)
State v. Kidd, 281 Md. 32, 375 A. 2d. 1105 (1977)
State v. Peterson, 75 A. 2d. 368 (Maine 1950)
Taylor v. State, 20 Md. App. 404 (1974)
Turner v. Pennsylvania, 338 U.S. 62, (1949)
Walker v. State, 12 Md. App. 684,694 (1971)
Ward v. Texas, 316 U.S. 547 (1942)
Watts v. Indiana, 338 U.S. 69 (1949)
Williams v. State, 220 Md. 180 (1959)
Williams v. State, 22 So. 2d. 821 (Fla. 1945)
Wong Sun v. United States, 371 U.S.471,83 S,Ct.407, 9 L.Ed. 2d.441 (1966)

United States v. Cella, 568 F. 2d. 1266 (9th Cir. 1977)
United States v. Fannon, 556 F.2d. 961, 965 (9th Cir. 1977)
United States v. Greer, 566 F.2d. 472, 473-74(5th Cir.)425 U.S.1069 (1978)
United States v. Nash, 563 F.2d. 1166, 1169 (5th Cir. 1977)
United States v. Provencio, 554 F.2d. 361 (9th Cir. 1977)
United States v. Womack, 542 F. 2d. 1047, 1051 (9th Cir. 1976)

Maryland Annotated Code
Article 41, Section 28, 28A
Article 27, Section 643B

Maryland District Rule 723 (a)

PRELIMINARY STATEMENT

The most important question that becomes essential for this court to answer is one concerned with (a) and (b) of the first question presented by Petitioner. This question may be considered as one dealing with the due process and equal protection clauses of the Constitution in part, and the violations of other Constitutional issues, the Declaration of Rights of Maryland, and Maryland's laws and procedures.

The question may be considered as one similar to whether or not tainte evidence may be used at trial to help convict, or whether or not perjured testimony may be used at trial simply because the province of belief is that of the jury, or whether or not the court might disregard pertainant facts that were not brought out at the trial.

Petitioner submits that the court may well feel that it should not be asked to answer issues or questions that have already been answered by the court in previous decisions, however, where there is evidence, very strong evidence, that the State and the lower court have not accepted decisions or rulings of this court in their proper prospective, or applied those decisions and rulings fairly and fully, then, in the interest of justice, the court must consider ruling on these questions even though they should have been ruled on adequately by the lower courts. Surely, this court will not allow any court to disregard the Constitution and the decisions and rulings from this court that interpret Constitutional judgements, mandates, and protections for the people of this country and the courts thereof.

The question is whether or not the lower court may use tainted and predjudicial circumstances for a finding of voluntariness or waiver by the actions and words of a suspect. Further, where there is clear evidence of fact in the records at the court's disposal that supports contentions of tainted circumstances and predjudice, can the court justly disregard these facts with rulings that are contrary to the facts. And, additionally, can the court disregard factual evidence of perjury and testimonies that are contradictory and untruthful, as a basis for any just ruling or decision?

Petitioner contends that the eighth amendment of the Constitution of the United States makes it quite clear that cruel and unusual punishment may not be inflicted upon anyone in this country, and, where there is a clear, factual basis of evidence that indicates that anyone is suffering such punishment through illegal incarceration, this court is obligated to resolve these issues in the interest of justice, particularly where they are crucial issues. United States v. Provencio, 554 F. 2d. 361 (9th Cir. 1977). Cf. Brookhart v. Janis, 384 U.S. 1, 16 L.Ed. 2d. 314, 86 S.Ct. 1245 (1966).

Petitioner contends that the lower court reached it's findings of voluntariness and waiver by using tainted, predjudicial circumstances, and the contradictory, untruthful testimonies of the State's witnesses as will be shown in the pages following. It will be noted that the lower court has made an issue of the Petitioner's intelligence, knowledge of law, and his rights, to such an extent that the lower court makes it clear that those illegal actions by the police, and their failure to obey the law, may be excused simply because the Petitioner knows the law.

However, the primary concern of this court, at this time, must be only whether or not the Petitioner has presented adequate questions or points of law that merit certiorari. Petitioner has been unable to find cases where a court has used tainted and predjudicial circumstances for a finding that these same circumstances make something legal and acceptable to the law.

While it may be true that this court will not rule on State laws or a Constitution of a State, it could not justly fail to resolve some issue that has a Constitutional basis, and Petitioner contends that the use of such circumstances, tainted and predjudicial, is against the mandates of the United States Constitution. Petitioner contends that where a lower court disregards illegal actions by the police, or fails to uphold the decisions and rulings of this court which reflect the true mandates of the Constitutio the court has then interpreted points of law wrongly, and it is this certiorari process that sets the points of law in the correct and rightful perspective.

If the State, by the courts therein or by the police therein, fail to uphold the laws of that State and the mandates of the Constitution of the United States, there must surely be adequate points of law being violated to support the issuance of a writ of certiorari. However, should the court feel that these issues may be resolved by further appeals in other lower courts, the unusual and unique action of the lower court in the instant case must be considered as a firm basis for certiorari.

In the following pages, Petitioner will show by clear evidence that his Constitutional rights were violated; that the State failed to uphold it's own laws, rules, and procedures; that the police in the instant case failed to obey the laws of the State and the Constitution; that the lower court failed to resolve crucial issues before using circumstances to make their ruling and decision; and, that by virtue of these actions and the action of the lower court, Petitioner suffers cruel and unusual punishment in violation of the Constitution and the Declaration of Rights of the State of Maryland.

In order to more fully outline the seeming disregard of the pertainant facts available to the lower court, in the records, and the erroneous and blind acceptance of testimony from the witnesses, who, by their own words as recorded in the records, contradict, and present false statements from which the lower court derived their findings, it is necessary to present, as arguement, the opinion of the lower court in pertainant parts. In such a manner, Petitioner feels that this court will be more apt to adduce the contentions of the Petitioner. Further, in such a manner, this court might more easily discern the misinterpretations of the lower court; the illegal actions of the police; the seeming disregard of State procedures and laws; and the violations of the Constitution and Petitioner's rights.

Because of the length of the lower court's slip opinion, this will require a lengthy petition and the Petitioner begs the courts indulgence, for it is necessary, as the court might see, that this petition be done in such a manner in order that certiorari may be considered because of these views and opinions presented by the lower court.

It must be noted that Arguement I, as presented herein, will contain the evidence that supports Petitioner's contentions that there was no voluntariness or waiver demonstrated by Petitioner's actions or words, and, in fact, will show conclusively that Petitioner asserted his rights often, and in such a manner that could not be construed as waiver.

Additionally, Petitioner contends that, as waiver and voluntariness may be adduced from the circumstances surrounding the interrogation and statements, North Carolina v. Butler, __U.S. __, 60 L.Ed. 2d. 286, 292, (1979), it may be assumed that other crucial factors may be considered solely from the record and the facts therein. Petitioner refers here to the fundamental right of "adequate counsel for his defense" as mandated by the Constitution and Declaration of Rights of Maryland. From the record, slip opinion, it may be noted that Petitioner had to present to the court, on his own, certain objections, among which was "Inadequate Counsel", and the lower court refused to rule on these issues because they were improper.

In the State of Maryland, "competency of counsel" is a question that is left to post conviction. However, Petitioner contends that, where there is such strong evidence in support of "inadequate counsel" in the record, it may be ruled upon on the basis of the facts present. Petitioner raises the question here because of the fact that the lower court has refused to rule on pertainant questions and points of law that Petitioner was forced to put before the court himself, as his lawyer refused to make the objections.

It would certainly be a denial of due process, equal protection, and right to adequate counsel, where the court refuses to answer such issues.

In the instant case, predjudiced may be discerned quite easily where an issue, such as "illegal arrest", which is supported by sufficient facts for a determination of such, is set aside by the lower court because of no objection or proper notification by counsel, particularly where the issue has such a crucial bearing on the ruling of the lower court that there was voluntariness and waiver adduced from the circumstances that would not have occured but for the disregard of the illegal arrest.

That defense counsel may have elected to stress the insanity issue is no excuse for failing to raise properly those issues that are definately in the best interests of the client. Where there is not one, but two, issue of an illegal arrest; evidence of improper testimony; evidence of violation of State laws and procedures; and evidence of violations of Petitioner's rights, that were not raised by counsel, there should be some consideration given to acknowledging "inadequate counsel" from the record, and the issues which reflect upon the circumstances that the lower court used to reach its decision should, in the interest of justice, been resolved before there was a determination that the circumstances showed voluntariness and waiver.

The court would not condone a finding of guilty without the benefit of first resolving all of the issues at trial, yet, in the same context, the court maintains that it may find a finding of voluntariness and waiver from the circumstances, without first resolving those issues which support the contention that those same circumstances are, in fact, tainted.

Petitioner is of the opinion that such points of law, a refusal by the court to resolve crucial issues that reflect upon it's decision; refusal to consider an issue such as "inadequate counsel", where a determination may be made from the facts in the record, which also reflects upon the court's decision, are sufficient grounds for certiorari to be granted.

The mere fact that there are thirteen issues under contention by the Petitioner, and the court sets a majority of them aside because they were either not raised by counsel, or were raised by Petitioner improperly, is certainly indicitive of "inadequate counsel", and for the court to refuse to consider their reflection on it's ruling, or to refuse to consider this denial of the right to adequate counsel which reflects upon the entire trial of Petitioner, from which records the lower court has reached it's decision, is certainly contrary to the mandates of the Constitution.

Petitioner presents this preliminary statement to the court so that it may understand better the contention that the circumstances, used by the lower court for it's decision, are tainted to such a degree that it is not reasonable, fair, or just, to use them to prove anything legal, or to show voluntariness or waiver.

I. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE NUMEROUS INCULPATORY STATEMENTS OF PETITIONER.

(a) Implicitly ruling that they were voluntary,

(b) Ruling that they were made in compliance with Miranda,

(c) Overlooking the question of whether they were the product of an illegal arrest.

The lower court, Special Court of Appeals of Maryland, maintains that under North Carolina v. Butler, Supra, it may show that voluntariness and waiver were inferred by strong evidence of the circumstances surrounding the interrogation (Slip Op. 7), and Petitioner concedes that this indeed is made quite clear by the court in Butler, Supra. And it is quite clear also that such a determination must be made on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id. at 293.

The lower court also maintains that under Walker v. State, 12 Md. App. 684, 694 (1971), it is not restricted in it's search for evidence that may support a finding of voluntariness and waiver, and, because the court may range beyond the record of the case to do so, Petitioner contends that he may bring forth evidence to support his contentions, not from far afield but from the records of his first trial which reflects upon the evidence that the lower court has used for it's findings and decision(Slip Op. 31).

Petitioner will endeavor to show, by sufficient evidence, that there were events preceeding these circumstances that tainted them beyond use as indicitive of anything except illegal conduct by the police. To that end, Petitioner would hope that this court would consider the following cases: United States v. Provencio, Supra, and Brookhart v. Janis, Supra, for the issues brought forth are of a crucial nature and reflect upon the taint on the circumstances in question.

The first of these preceeding events is the warrantless arrest of the Petitioner in his home, and any doubt as to their being such an arrest is answered by the State in it's brief to the Special Court of Appeals.

(Br. 17) After Appellant's warrantless arrest as a California parole violator." See also (Tc. 18, 30)[3] referring to arrest of Petitioner.

In the recent cases decided by this court, Payton v. New York, and Riddick v. New York, there was a ruling that the police could not make a warrantless arrest in the home where there has been no consent to enter, otherwise the arrest was unconstitutional. As in these cases, the instant case has similar points, such as, the police had ample time to obtain a warrant for Petitioner's arrest; there were no exigent circumstances; and,

---

3. Transcript reference "(Tc)" on the motion, first trial.

there was no consent given to enter the trailer.

When the police came to Petitioner's trailer, they knocked on the door and demanded entrance by the authority of the law, stating, "open up, this is the police." This was done twice. When Petitioner opened the door, Sgt. Luce stated that he had a warrant for Petitioner's arrest for parole violation from California. Petitioner let them in the door, which opens on the livingroom, and once inside, Sgt. Chaffey read Petitioner the Miranda warnings (Tc. 30). However, because Petitioner has no more than his own word as to what the police said and did, the court must take some things into consideration.

First, in as much as the lower court makes so much of the fact that the Petitioner knows the law and his rights, it may be assumed that he would ask the police what they wanted before letting them into his home.

Second, knowing the law, as it was then, Petitioner may well have let the police into his home because of an awareness of the rule that, after an announcement of authority and purpose, the police, making an arrest, may enter with the use of force.

Third, if the procedure in Maryland is that the police must give an announcement of authority and purpose, then it may be assumed that there was mention made of an arrest warrant as Petitioner contends. However, if there is such a rule or procedure, and the police maintain that they did not make an announcement of authority and purpose, then they would have violated the laws of the State by not so doing.

Fourth, the most important consideration is "intent", and clearly, in the instant case it was the intent of the police to arrest Petitioner, and since Art. 41, Sec. 28A, Maryland Annotated Code, allows the police to make a warrantless arrest, without restrictions, it may be assumed that they did mention that their intention was to arrest. Therefore, even if they claim that they did not state that they had a warrant, the mention of arrest: We are here to arrest you, or, You are under arrest, might well be considered as sufficient coercion to gain entrance.

That the record might indicate that the Petitioner let the police into the livingroom does not answer the question of why he did so, and when one considers the circumstances of the arrest, it is quite clear that there was an illegal arrest made, either by a violation of State laws; a violation of the Constitution; or, sufficient coercion to make the arrest illegal.

Petitioner contends that, because the police told him that they had a warrant for his arrest, when in fact they did not, he was coerced into allowing them to enter his home. Therefore, the arrest of Petitioner was illegal, and as such, would taint any subsequent circumstances.

Petitioner contends that Art. 41, Sec. 28A, Maryland Annotated Code, is unconstitutional on its face because of the fact that it contains no restrictions, such as making sure to gain consent to enter the dwelling to make a warrantless arrest. Under the present language, the police may well assume that it is permissable to enter a dwelling, even with force, to make a warrantless arrest. As it stands now, the law is too broad and may well cause the police to engage in illegal arrests.

Petitioner submits that he is not sure of whether or not, at this time he has the right to question whether or not any arrest, without a warrant, made in the home, even with consent to enter, can be considered as legal, in as much as consent to enter may be obtained under any ruse. Where there is such a law as Art. 41, Sec. 28A, which allows a warrantless arrest in a home, the police, so as to circumvent Payton and Riddick, might easily gain consent to enter under any ruse, then make their arrest. Thus, it would become a legal arrest, without a warrant, based solely upon a consent that was given for something else.

The sole basis for making a warrantless arrest in the home legal, at this time, is consent to enter the home. How the consent was obtained, and under what ruse it was obtained, must be the controlling factor in ruling on whether or not a warrantless arrest was legal. It must be admitted that there is, unfortunately, an intimidation in the words, "Open up, we are the police", or "This is the police, we are here to arrest you," or even,"We are police officers, may we come in and talk to you?" Therefore, these may be considered as coercive, making a consent invalid.

Because of the fact that warrants are easily obtainable where there is probable cause, and exigent circumstances Constitutionally allow police to make warrantless arrests anywhere, any warrantless arrest in the home, even with consent to enter, should be unconstitutional, simply because consent to enter may be obtained by any ruse. Such a ruling would eliminate all of the probable arguements that would arise over the consent. How simple to state that the police may not make a warrantless arrest in the home under any circumstances other than exigent circumstances, thus eliminating any arguements as to valid or invalid consents.

Petitioner elaborated upon this issue because this court stated that it had not, even in Payton and Riddick, resolved all questions pertaining to warrantless arrests in the home and the issues related thereto. It may be that the Petitioner does not have the right to raise this issue at this time, in this petition, though it pertains to the matter at hand, and, if such is the case, the court may easily set it aside without refusing to consider the other issues in this petition.

We turn next to Art. 41, Sec. 28A, Maryland Annotated Code, and the question of an illegal arrest under this statute. The questions that must be considered here are, is this statute unconstitutional because it does not contain any restrictions as to how an arrest without a warrant may be made. At the present time it simply states:

> The arrest of a person may be lawfully made by any peace officer without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year...

In as much as it says nothing about such an arrest in the home and is quite broad in scope, it should be considered as unconstitutional as it now stands.

As previously stated, the arrest would be illegal in any event as the police obtained consent to enter by stating that they had a warrant for the arrest of Petitioner, when, in fact, they did not have one. A consent that is obtained under such a ploy is invalid, as the possession of a warrant infers that a person does not have a right to resist the entrance of the police to effectuate the arrest.

Additionally, Petitioner contends that the police in the instant case, did not have the information pertaining to the crime and time involved in the California issue. The only information that the police had when they made the warrantless arrest was a telegram from California that stated that Petitioner was a parole violator and California would extradite. Therefore, the arrest would be illegal, under Maryland's laws, because the police failed to comply with the requirements of Art. 41, Sec. 28A.

The State maintains that the police arrested Petitioner under Art. 41, Sec. 28, Maryland Annotated Code, because they took him before a district court commissioner at 10:00 p.m. the night of October 30, 1977. However, the State fails to realize that Petitioner was arrested by the police, without a warrant, at 12:30 p.m. in the afternoon of October 30. Since the police arrested Petitioner at that time, without a warrant, the authority for the arrest had to be Section 28A (Warrantless arrest), not Section 28 (Arrest before a commissioner). The State simply ignors the fact that the police made the arrest at 12:30 in the afternoon, not 10:00 p.m. at night.

Additionally, the lower court stated: (Slip Op. 25) "Finally, in the Miranda regard, appellant contends that because no fugitive warrant was obtained pursuant to Md. Code, Art. 41, Sections 28 and 28A, his initial arrest was illegal and the statements were inadmissible as the fruit of such illegality. Appellant having failed to raise this below has for practical purposes waived it on appeal.

Aside from the fact that Petitioner did not claim that the arrest was illegal because no fugitive warrant was issued, instead, claimed that the arrest was illegal because the police failed to comply with the requirements of this statute, the lower court, after refusing Petitioner the right to raise the issue, showed predjudice by stating: (Slip Op. 34) "Appellant was legally arrested as a fugitive."

Petitioner has presented arguements that the arrest was illegal, and the crucial significance of these issues is that, if true, there would be no subsequent circumstances from which the court could draw a conclusion that there was voluntariness and waiver. Because of the illegal arrests the circumstances are tainted as fruit of a poisoned tree. State v. Kidd, 281 Md. 32, 375 A. 2d 1105 (1977); Mefford v. State, 235 Md. 497, 201 A. 2d 824 (1964); Wong Sun v. United States, 371 U.S.471, 83 S.Ct. 407, 9 L. Ed. 2d. 441 (1963).

Next, Petitioner was taken to the barracks and read the warnings for the arrest issue again. He requested counsel, informing the police that he was an indigent. (Tc. 40, 46). The police elected to cease questioning as this request effectively "cut off questioning" on the arrest issue. Then, Petitioner was routinely processed, which action concluded the investigation as to the arrest issue.

At this time, Petitioner had every right to expect that the police would follow the directive of Art. 41, Sec. 28A, which states: "But when so arrested the accused must be taken before a judge or district court commissioner with all practicable speed."However, in the instant case, the police took Petitioner to the investagation office for questioning about an unrelated incident, even though the barracks where Petitioner was being held was only ten minutes from the commissioners office, and there was no justification or necessity for not complying with the directive.

In place of the McNabb-Mallory Rule, Maryland relies on Johnson v. State, 31 Md. App. 303, 355 A. 2d. 504 (1976), though Petitioner contends that this case does not cover the entire scope of predjudice that results from such a delay. However, it states:

> "Where the delay is less than the proscribed maximum this rule anticipates that a determination as to necessity and reasonableness of the delay will be made by the courts on a case to case basis." 282 Md. at 320, 284 A at 712-13.

In Petitioner's case, the only determination that was made as to the reasonableness and necessity was as follows, by Judge Thayer:

> "I find that the requirements of the johnson case are not applicable as I understand the

> testimony. That the delay in this case is not unreasonable." (Tc, 342)

In view of the fact that the police offered no excuse for the delay; none was asked for by the judge; the close proximity of the commissioners office; and, the delay was for a total of ten hours, the delay cannot be considered as anything other than unreasonable. The decision of the judge, based upon his understanding of the testimony, could hardly be considered as a fair determination of reasonableness and necessity

Additionally, the police admit that they had no probable cause in relation to Rusty Marine. (Tc. 61). See, United States v. Greer, 566 F. 2d 472, 473-74 (5th Cir.) 425 U.S. 1069 (1978). (Probable cause is necessary for nine hour detention and questioning). Considering McNabb- Mallory and Johnson, Supra it is quite clear that the delay was unreasonable in this case. As a poisoned tree, this illegal action would taint the circumstances subsequent to the action, and those circumstances could not be used by the court for a finding of voluntariness and waiver.

Johnson, Supra, goes even further:

> "In our view the defendant suffers predjudice whenever a statement procured during an illegal delay is used against him at trial or leads to other evidence ultimately employed to convict him. " 282 Md. at 327, 254 A. at 716.

We not only have the statements of Petitioner taken during the delay that led the police to the area where the Petitioner had been hunting on Saturday(the area where the bodies were discovered) (Tc. 33), but we also have numerous statements, used at trial, that were employed to show that Petitioner's actions were voluntary and that a waiver could be assumed to have been made by Petitioner from these words and actions. To wit:

(Tc. 335) When Mrs. Larmore came to the barracks on Monday, the 31st of October, in the presence of Trooper Hornung, Leuschner stated to her that he had killed Rusty Marine.

(Tc. 336) Petitioner catagorically denied the offer of the phone even though Keating, Hall, and Lewis testified that the offer was made.

(Tc. 341) Petitioner asked Mrs. Larmore to get him a lawyer, ans she said that she would get one the next day. Petitioner was satisfied.

(Ta. 360) Again, mention of the use of the phone and refusal to do so by Petitioner.

These are but a few of the statements that were used to show that the Petitioner's actions were voluntary. However, the court might note that there are many other predjudicial remarks and actions that occured during this illegal delay, making Johnson, Supra, applicable to this case.

However, even disregarding these statements that were made during the delay, the most significant evidence of predjudice is that the lower court used these circumstances, actions, and words, obtained during the delay to rule that there was voluntariness and waiver.

Petitioner has shown that there were two illegal arrests as well as an illegal delay, all of which would taint the subsequent circumstances that the court used for it's findings. Now, Petitioner further stresses United States v. Greer, Supra because the police detained and questioned Petitioner about an incident unrelated to the arrest issue, without the benefit of probable cause, for ten houms.

That Petitioner was arrested for parole violation does not remove his rights. In fact, it brings them into closer focus because he is now faced with the adversary process. Once the police had concluded the arrest issue, Petitioner should have been taken before a commissioner, but instead, the police took him to the investigation room for questioning. Because of the fact that Petitioner, though arrested for parole violation, retains his rights, he could not be held forcibly, because he could not leave the barracks of his own free will, without probable cause to answer questions about an unrelated incident. Since this action also violated Petitioner's Constitutional rights, the subsequent circumstances would be tainted.

Petitioner contends that the court might also consider that the action of the police, unjustified use of police arrest powers, created a technical arrest, which is significant because of the fact that there would be no evidence to support the arrest, making it illegal.

See, 5 Am. Jur. 2d. Arrest, Sec. 1:

> 'Any act that indicates an intention to take a person into custody and that subjects him to the actual control and will of the person making the arrest.'

From, 'A Citizens Guide to Legal Rights', by J. Shane Creamer (4th printing, October 1974, Ch. 4)

> 'The law of arrest uniformly holds that virtually any restraint by a police officer, no matter how slight, when coupled with an intent by the officer to arrest, constitutes a technical arrest.'

That there was a seizure and restraint is evident from the record, and because of the suspicions directed against Petitioner, and interrogation for incrimination (Tc. 58, 59, 267, 273, 194), it would be ludicrous to say that there was no intent to arrest, for the Marine issue.

The significant point is that a technical arrest, which becomes an illegal arrest, would taint the subsequent circumstances so that they could NOT be used to show voluntariness or waiver.

These issues, already mentioned, have preceeded the circumstances in question and would have tainted these circumstances to such an extent that they could not logically, or justly, be used to rule voluntariness or waiver was evident from a review of these same circumstances. A primary question that must be considered is, whether or not the court will rule on these issues, because of their crucial impact on the circumstances, or whether the court will remand the case back to the lower court so that that court might resolve these issues before reaching any finding on waiver or voluntariness with the help of these circumstances.

It is significant that the lower court has stated (Slip Op. 32) "In the light of that experience, we then look at the circumstances giving rise to the confession. Bram v. United States, 168 U.S. 532 (1897). There is presumably no restriction upon factors that may be considered but the cases generally have emphasized those which should not be overlooked." And the lower court includes (6) the legality and illegality of arrest, Payne v. Arkansas, 356 U.S. 560 (1958), Ward v. Texas, 316 U.S. 547 (1942), and (8) delay in presentment to a commissioner, Johnson v. State, Supra, and (10) prolongation of interrogation, Ashcraft v. Tennessee, 332 U.S. 143 (1944); Turner v. Pennsylvania, 338 U.S. 62 (1949), and Leyra v. Denno, 347 U.S. 556 (1954), and (11) the failure to warn or appraise the accused of his rights, Payne, Supra, Turner, Supra, Harris v. South Carolina, 338 U.S. 68 (1949), Watts v. Indiana, 338 U.S. 49 (1949).

However, it may be clearly seen that the lower court itself did not review the record for, or consider, these issues (6), (8),(10), and (11), before using the circumstances, that these issues may have tainted, for a finding of voluntariness and waiver. Therefore, it is reasonable to assume that, since these issues are crucial and did occur in the present case, a review of the lower court's opinion is justified in view of the facts.

Petitioner now turns to the circumstances themselves, using the lower court's slip opinion as a basis for showing that that court failed to make a fair and just decision in the instant case and, therefore, certiorari should be granted by this court.

1. (Slip Op. 10) October 30, 1977, Petitioner was arrested for parole violation, because California would extradite (telegram). At the barracks he was read the warnings and requested a lawyer. He was routinely processed and taken to the criminal investigators office. There he was questioned concerning Rusty Marine.

1A. Several things may be noted here. As to Art. 41, Sec. 28A, and the contention of Petitioner that the police failed to meet the requirements of necessary information, the note that California would extradite is the

message that the police received by telegram from California. Although this may have been sufficient for a judge or commissioner to issue a warrant on, it did not meet the requirements of Art. 41, Sec. 28A. Also, the court may note that the evidence here conclusively shows that the arrest issue had been completed and Petitioner, instead of being taken before a commissioner as this statute requires, with all practicable speed, was taken to the Criminal Investigation Office for questioning on an unrelated incident.

2. (Slip Op. 11) That request for counsel was "scrupulously honored" as a triggering mechanism for his "right to cut off questioning" in regards to the charge for which he was arrested; however, he willingly agreed to discuss the missing boy."

2A. It is important for the court to note that the lower court stresses that this request for counsel was a triggering mechanism for the "right to cut off questioning." Therefore, the lower court could hardly turn around and say that a request for counsel does not require that the police must cease questioning when a request for counsel is made. The reason for the importance of noting this is that such was not done later when Petitioner again requested counsel. Additionally, there is a question here as to the obligation of the police to read Petitioner the Miranda warnings. We have to move to (Slip Op. 13, Footnote 3)

> Until the next day the police did not know if the boys were alive or dead, safe or sound, restrained or free, or simply run-a-ways. The police were simply seeking information about one of the boy's whereabouts from the last person known to have seen him. Although it is apparent that the police had more than a passing interest in Leuschner and obviously had some suspicion that he was not disclosing all he knew about the missing Rusty, in a criminal sense he was not focused upon as an accused. Escobedo v. Illinois, 378 U.S. 478 (1964). Had Leuschner not been lawfully in custody as a fugitive, he could not have been held or charged as an accused in the absence of some probable cause by the police to believe he had committed a crime. While one may be a suspect in an investigatory sense, he could hardly be focused upon as an accused until a crime with which he might have been connected is known to have been committed--by someone.

The lower court has answered several things here which the court must take note of, as it supports Petitioner's contentions.

(a) The lower court states that Petitioner could not be held in the absence of probable cause, and contends that because he was lawfully in custody for a parole violation arrest, he does not retain his rights as a citizen, not to be held by the police unless probable cause is present. This is grave error, and the fact that the arrest issue was completed and the law in Maryland requires that, after the initial process of identification is completed, an arrested person must be

taken before a judge or commissioner with all practicable speed, makes it quite clear that an arrestee retains all of his Constitutional rights. United States v. Greer, Supra.

(b) Petitioner contends that the lower court is in error when it maintains that a crime must be known, that there must be a crime already committed.
(Slip Op. 3) Soon to follow Massiah was Escobedo v. Illinois, Supra, which extended the right to counsel to a suspect-not necessarily indicted-but from the moment the investigatory phase of an interrogation becomes accusatory and focused upon the suspect.

> "(Where an) investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment, Gideon v. Wainwright, 372 U.S. (335 (1963) at 342, 9 L.Ed.2d. at 804, 93 ALR2d 733, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." 378 U.S. at 490-491

Thus, it is clear that the basis for reading the warnings is triggered by the suspicion that the suspect has committed a crime, is in police custody, and is being interrogated for incrimination, when the focus has shifted upon the suspect as one who has committed some crime.

The question is, in the instant case, were the police obligated to read the Petitioner the warnings before questioning about Marine? It is a matter of record that the police did not, at the first questioning related to Marine, read the warnings. Therefore, Petitioner must show that Miranda was, in fact, triggered by the circumstances at that time. This requires a showing of facts that are available in the records.

(a) Slip Op. 10, Petitioner was taken to the Criminal Investigation office for the express purpose of questioning about Rusty Marine. Intent to question is thus answered.

(b) Tc. 267,273, Miss Judy Zimmerman testified that Trooper Bacon told her that Petitioner was suspected of murdering two boys and burying them. This was at the farm where Bacon had recruited her assistance in locating the graves. Significantly, this occured on the morning of October 30, 1977, prior to Petitioner's arrest on the same day.

(c) Tc. 58,59, Sgt. Luce admits that Petitioner was a suspect and, since Luce was in charge of the investigation, it may be assumed that Tpr. Bacon was acting under the orders of Luce when he went to the farm to try and locate the graves of two murdered boys.

(d) Tc. 194, Trooper Hall testified that the police were questioning the Petitioner to see if he was involved in kidnapping or murder, which is what the police had suspected happened to the boy.Tc. 193.

(e) Petitioner was in total custody,(and though the arrest issue had been concluded, he could not leave), was a prime suspect in a kidnapping and murder, and was interrogated for incrimination.

Reviewing these facts, there can be no question but what Miranda was, in fact, triggered, and the police should have read the warnings to the Petitioner. Although the lower court maintains that Petitioner was willing to talk to the police about Marine, and may have done so, this does not excuse the police from obeying the law in a manner inconsistant with that law. Petitioner's actions cannot erase police misconduct or failure by the police to follow the law as proscribed.

Miranda v. Arizona, 384 U.S. 436 (1966):

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed. 384 U.S. at 444.

Michigan v. Mosley, 423 U.S. 96 (1975):

> "Questioning on an incident unrelated to the one for which the accused is in custody may be pursued (after the accused has cut off questioning as to the incident for which he was arrested) if full and complete Miranda warnings are given to cover the second incident. Id. 423 U.S. at 104-06.

Mincey v. Arizona, 98 S.Ct. 2408, 2416 (1978), voluntary statements are inadmissible at trial because of Miranda violation. And also, any use of involuntary statements at trial denies due process even though ample evidence aside from confession supports conviction. Jackson v. Denno, 378 U.S. 368, 376 (1964).

The evidence indicates that the police should have read the warnings to Petitioner before questioning him about Marine, and, because they failed to do so, as required by law, no statements obtained during interrogation could be used against him. Further, the illegal action of the police had to taint subsequent circumstances. Those circumstances in question here.

3. (Slip Op. 12) This is the testimony of Sgt. Luce and the time refered to here is prior to 4:00 p.m. During this time, Betty Larmore, girlfriend of Petitioner, came in and was permitted to be with, and talk to him. The Petitioner relayed his request for the retention of counsel to her. Luce states that Petitioner requested her to get a lawyer for the California issue and not the Marine issue. According to this testimony, this is what Sgt. Luce overheard them talking about.

3A. Petitioner shows here, factual evidence to refute the testimony of Sg Luce, as to Betty being there at the time stated and, as to Luce being abl to overhear them talking about a request for counsel for the California issue.

(a) Tc. 35-6, Sgt. Luce testified that Mrs Larmore (Betty) was not present until 6:00 p.m.(At which time Lt. Keating, not Luce, was the one questioning Petitioner(Tc. 68). Therefore, Sgt. Luce could not have seen Betty or overheard any conversation between Betty and the Petitioner.

(b) Slip Op. 15, Lt. Keating testified that when Betty came into the roo he could not hear all of the conversation, though there was mention of an attorney, for what, he could not say. Therefore, if Luce was testifying as to what Keating told him, the content of the alleged conversation is not true, as Keating stated that he could not tell exactly what was discussed as far as counsel was concerned.

(c) Tc. 176, Betty testified that when she went into the room, she asked Petitioner to talk about Rusty Marine. Petitioner said, No, get me a lawyer. Since Betty made no mention of the California issue, and stated that, when she tried to get him to talk about Rusty, he said no, he wanted a lawyer, there can be no doubt but what he wanted a lawyer for the Marine issue and not the California issue, as the police and the lower court maintain.

(d) Tc. 176-77, Betty testified that when she asked him to talk about Rusty, he said that he was not going to answer any questions until he saw a lawyer. Hardly indicitive of waiver. She also testified tha the police were in the room, and when Petitioner requested counsel, they said, "We're not getting anywhere with him," and asked Betty to leave the room.

In view of these facts, it is quite evident that the testimony of Luc could not be used to help support a finding of waiver or voluntariness, as the testimony could hardly be considered as admissible evidence. Further, the factual evidence clearly indicates that Petitioner made it clear that he was not going to answer any questions until he saw a lawyer, and, that he did not want to talk about Rusty Marine.

4. (Slip Op. 13, 14) At 4:00 p.m., Lt. Keating and Trooper Hall ran the interrogation of Petitioner, relating to Rusty Marine, and prior to any questioning they read the warnings to Petitioner. Leuschner never indicate a desire to stop talking about Rusty; but about an hour after Keating had arrived, Mr. Leuschner said he would like to have an attorney. After the request, Keating advised Petitioner, "Theres the phone, you can call an attorney, or I'll call one for you." Petitioner made no effort to use the phone or the telephone directory.

4A. Petitioner shows here, factual evidence to refute the testimony of Lt. Keating taken from the records. Petitioner will also show that there is a serious misunderstanding of Miranda and Mosley, AND THE OBLIGATIONS THAT ARE, IN FACT, PLACED UPON THE POLICE IS SUCH A SITUATION.

At 4:00 p.m., when Keating took over the interrogation with Trooper Hall, they read the warnings to Petitioner. Keating infers that there was no request for counsel made at that time, yet, an hour later there was a request for counsel.

(a) Tc. 68, 69, Keating's testimony that he and Hall interrogated, and Petitioner said, "I want to talk to an attorney." This was not an hour later but at the very beginning of the interrogation.

(b) Trooper Hall was with Keating and he testified (Tc. 188-89), that at the beginning of the interrogation the Petitioner stated that "he did not want to talk about the Marine but but wanted a lawyer." He also testified that Petitioner requested a lawyer twice, and at the second request he was told, by Hall, not Keating, that he could call a private lawyer but would have to wait until he was formally charged to get a public defender.

(c) Tc. 338, 339, Judge Thayer acknowledged that the statement was made by Trooper Hall, and, that it was a misquotation of Miranda.

Lt. Keating also testified that the Petitioner never indicated a desire to stop talking about Rusty Marine (Tc. 100).

(a) Tc. 188, Hall testified that Petitioner said that he did not want to talk about Rusty Marine.

(b) Tc. 176, Betty testified that when she went in to see Petitioner and asked him to talk about Rusty, he said, no, get me a lawyer. She also testified that that he said, he was not going to answer any questions until he saw a lawyer.

The lower courts have all made an issue about this offer of the phone made by Trooper Hall, disregarding the fact that Hall misquoted Miranda and Petitioner was an indigent who notified the police of such.

> (Slip Op. 14, Footnote 4) It should be noted that no case has as yet placed the burden of providing counsel upon the police. It is the denial of a request to permit an accused to contact counsel that violates the constitution, Crooker v. California, 357 U.S. 433 (1958), and Lt. Keating obviously provided ample opportunity and assistance to effect that purpose. Nor is there a per se rule as appellant would urge upon us that the police must terminate any contact with an accused unless counsel is present, once a request for counsel is made. Michigan v. Mosley, 423 U.S. 96 (1975).

To this, Petitioner can only turn to the decisions of the Supreme Court for an answer. Escobedo, Miranda, and Mosley: Once a request for counsel has been made, the police must cease questioning. 384 U.S. at 444-445; If he indicates in any manner that he wishes to consult with an attorney before speaking to police, there can be no questioning. Id. at 444-445; If he indicates in any manner that he wishes to remain silent the interrogation must cease. 384 U.S. at 473-474; The court in Miranda showed "that when it wanted to create a per se rule against further interrogation after assertion of a right, it knew how to do so. The court there said that, "(i)f the indicidual states that he wants an attorney, the interrogation must cease

until an attorney is present." 423 U.S. at 109-110.

The court may say that this does not answer the question of whether or not there is an obligation on the police to obtain counsel for the Petitioner once he has made a request for a lawyer, however, the court can clearly understand that, if a request for counsel "cuts off questioning", the Petitioner need not make any effort to use the phone to call counsel just to allow the police to question further about something that the Petitioner does not want to discuss, as evidenced by the request. If the police want to continue questioning after the request, then they would have to obtain counsel to do so, not the Petitioner because he already has what amounts to a lawyer standing between him and further questioning by the police, "the right to cut off questioning." Thus, contrary to what the lower court says, the police have an obligation to cease questioning, and, if they wish to continue, provide counsel.

Thus, the issue of the offer of the phone becomes moot, but not for this reason alone, though it should be sufficient. When the offer of the phone was made, Keating and Hall testified that the Petitioner made no effort to use the phone, nor did he say anything, and, of course, since the request had cut off questioning the phone was unimportant. However, the court might note the following from Miranda:

> "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." 384 U.S. at 475

Surely the court cannot accept silence and inaction as indicitive of an intelligent and understanding rejection. Doyle v. Ohio, 426 U.S. 610, 617-18 (1976) (Defendants silence is ambiguous and may represent the Fifth Amendment right to silence. Thus, the issue of the phone becomes moot for yet another reason and could not be used to show waiver or voluntariness.

5. (Slip Op. 15-16) Refers to the fact that Keating did not hear all of the conversation between Betty and Petitioner, could not state just what Petitioner wanted a lawyer for. Refers also to Halls testimony that the Petitioner did not want to talk about Marine and wanted a lawyer. Keating states that during two and a half hours Petitioner did not indicate any desire to cut off questioning.Lower court states (Footnote 5) that the trial judge believed this testimony that no further questions were asked, and states also that it (lower court) found no reason to believe otherwise.

Keating states that Petitioner never stopped talking about Marine and after request for lawyer, no further questions were asked of him. Trooper Hornung questioned Petitioner about Marine, and asked him if he would be

willing to take a polygraph test. Petitioner stated that he would not take a polygraph test without first consulting with a lawyer.(Slip Op. 16-17). 5A. In view of the fact that Luce could not have overheard Betty and the Petitioner talking, because she did not show up until after 4:00 p.m., and Keating testified that he did not hear just what the request for a lawyer was for, the lower court could not state that the Petitioner only requested a lawyer for the California issue. (Tc. 35-6).

Considering the testimonies of Hall and Betty (Tc. 176, 188), that the Petitioner stated that he did not want to talk about Rusty, and would not answer any questions until he saw a lawyer, it is hard to understand how, or why, he would just continue talking about Rusty for two and a half hours and, refutes Keating's testimony that Petitioner did not indicate any desir to cut off questioning, particularly since the two requests for counsel tha the police admit were made, should have cut off questioning.

While it may be understandable for a trial court to believe testimony, the same can not be said for the lower court here because of the reliance on Walker v. State, Supra, to review all of the necessary records to reach the truth. Slip Op. 31: "Justice is (or should be) concerned with the truth whether it convicts or exonerates."

As to Keating's testimony that no further questions were asked of the Petitioner after he had requested counsel:

(a) Tc. 86, Keating testified that Petitioner was questioned for about two to three hours after he had requested counsel. He stated that it was his normal practice to cease questioning when a request for counsel is made, but did not do so in this instance.

(b) Tc. 191, 192, Hall testified that Petitioner did not express any interest in calling a lawyer, and a short time later we resumed the questioning. He stated, Petitioner was asked certain questions by Lt. Keating and himself.

(c) Ta. 46, 47, 180, After the two requests for lawyer between 4:00 and 6:00 p.m. (between the hours of 7:00 to 9:30 p.m.) Petitioner was questioned by Luce and Hall; Hornung, Bacon, and Pollack; Luce and Hall again; Hornung again; and, Lewis.

6. (Slip Op. 17) These were the references made by Appellant expressing a desire for counsel. In the first instance he restricted his request solel to the fugitive charge and volunteered to help with the search for the missing boy, Rusty Marine. The officers honored the second more general request by refraining from questioning further and by offering assistance in procuring counsel. Appellant, instead of accepting the officers' assistance, preferred to talk again with Betty whom he had commissioned to get him counsel for the fugitive charge which she expressed an inability to do because it was the Sabbath. Prognosticating this precise possibility, it will be recalled Miranda said:

> "If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." 384 U.S. at 474

(Slip Op. 18) But Leuschner did not indicate that he wanted counsel before speaking further to the police. On the contrary, without any prompting, Appellants continued conversation of the subject under inquiry, both to Betty Larmore in the presence of the police and to the police, belied any inference that he was exercising his Fifth Amendment right.

6A. Petitioner admits that his first request for counsel was indeed for the fugitive issue, but, as to Petitioner volunterering to help the police in the search for the missing Rusty Marine, the lower court could not use this to help reach their finding of voluntariness and waiver because, as Petitioner pointed out, the circumstances required that the police read the warnings to Petitioner and they failed to do so.

As to the police honoring the "second more general request" by refraining from questioning and offering assistance in procuring counsel

(a) Tc.86, 191, 192, and Ta. 46, 47, 180, Keating, Hall, Luce, Hornung, Bacon, and Pollack, all testified that the police continued to question Petitioner after the requests for counsel.

As to Petitioner requesting Betty to get him a lawyer for the fugitive charge, Petitioner showed by factual evidence that neither Keating or Luce actually heard him ask Betty to get him a lawyer specifically for the fugitive charge, and, because Betty testified that when she asked him to talk about Rusty, he said, no, get me a lawyer, it should be assumed that he was asking for a lawyer for the Rusty Marine issue, particularly since he had been read the warnings and was being questioned as to a kidnapping and murder. It is ludicrous to imagine that this intelligent man would, in the face of these serious charges involving a young boy, request a lawyer for a parole violation charge.

Because the police did at least hear the Petitioner request a lawyer of Betty, though not what for, Miranda is significant:

> "If, however, he indicates in <u>any manner</u> and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. <u>Id.</u> at 444-445

And though the lower court states that Petitioner did not indicate that he wanted counsel before speaking further to the police, Betty had testified that Petitioner said, in the presence of the police, that he did not want to talk about Rusty, wanted a lawyer, and <u>would not answer any questions until he saw a lawyer</u>, embraces Miranda at 444, 445, 474, and refutes the lower court finding.

The lower court states that Petitioner's continued conversation about Rusty Marine, to Betty and the Police, without prompting from the police, belied any inference that he was exercising his Fifth Amendment right.

(a) Tc. 71, 86,192, Keating and Hall testified that, after the request for lawyer, they continued questioning Petitioner. This refutes any belief that there was no prompting.

(b) Tc. 176, 188, Testimony by Betty and Hall that Petitioner stated that he did not want to talk about Rusty Marine. This refutes any belief that Petitioner just continuously talked about Rusty Marine at this time.

(c) The very fact that Petitioner asked Betty to get him a lawyer, then requested a lawyer twice of the police (Keating and Hall) makes it quite clear that he was exercising his rights. In the face of these facts it would be ludicrous to state that the Petitioner was not exercising his rights.

7. (Slip Op. 18, 19) Here, as in Butler, the actions and words of the Appellant clearly implied a knowing and intelligent waiver of the rights of which he was repeatedly advised and from his extraordinary past experience must have been keenly cognizant.

Having found so clear a waiver of counsel, we note in passing that it is questionable whether Leuschner was entitled to counsel (regarding the missing Marine boy) at the time of his request. Throughout the entire day there was no crime known for which Leuschner could have been focused upon as a suspect. The Sixth Amendment right is a right of an accused, at least in jeopardy of a portending criminal proceeding. Escobedo extended the right from one formally accused (Massiah) to one focused upon as a suspect.

No case has yet provided the right as constitutionally available upon a missing person inquiry, absent knowledge that a crime has been committed.

It would be judicially naive to infer that the police had not focused their attention upon Appellant in regard to Rusty, especially in light of Leuschner's record; however, the investigation could hardly turn accusatory even as to Rusty, until some knowledge that a crime had been committed is apparent to the police. that precise point:

> "When the process shifts from investigatory to accusatory...our adversary system begins to operate..." Escobedo, Supra, at 492

7A. Petitioner has shown, with factual evidence, there is anything other than a clear waiver of counsel, as the lower court states:

(a) Petitioner requested a lawyer for the fugitive issue.

(b) Petitioner requested that Betty get him a lawyer.

(c) Petitioner requested a lawyer twice of Keating and Hall

(d) Petitioner requested a lawyer of Trooper Lewis.

(e) Petitioner stated that he did not want to talk about Rusty Marine.

(f) After his request for counsel, at the time when the police stated that they offered him the phone, Petitioner tried to exercise his right to remain silent, knowing that, since the request effectively cut off questioning, he need not speak or do anything.

(g) Keating and Hall testified that they questioned Petitioner after his requests for counsel, and the factual evidence supports the fact that other teams of officers questioned him after his requests.

(i) Petitioner requested a lawyer of his niece, Judy Zimmerman.

This does not include the illegal conduct of the police, and it must be admitted that it is unclear how the lower court could state that the Petitioner waived his rights when the factual evidence, that was available to the lower court, proves conclusively that the opposite is true here.

That the lower court may have found so clear a case of waiver does not, as the factual evidence indicates, necessarily make it true. In fact, because the lower court had access to more records and transcripts than Petitioner, there is no reason for the court to have overlooked the facts that are in the records. If, as the lower court states, it may look far afield for evidence to support its findings, then it surely should have looked at the transcripts of the first case, for it is clearly evident that the testimonies of Luce and Keating are contradictory. With the added facts supplied by Betty Larmore and Trooper Hall, State's witnesses', it becomes very clear that the testimonies of Luce and Keating, used to great extent by the lower court, did not match previous testimonies.

Even should the court state that the circumstances did not require the reading of Miranda, that is, Trooper Bacon searching for the bodies of two murdered boys and the admission by Bacon and Luce that they did indeed suspect Petitioner of this action, there is still kidnapping to consider because, supposedly, Petitioner was the last to see the boy alive, though this is refuted by Betty Larmore, who testified that she was the last one to see the boy alive. (Td. 437)[4] However, the suspicions of the police, as to murder and kidnapping, the fact that Petitioner was a prime suspect in connection with these acts, the fact that he was questioned for incrimination, as to these suspicions, triggered Escobedo ; and, the fact that the Petitioner was in total custody for interrogation, triggered Miranda, and the police should have read the warnings before questioning.

If, these suspicions and circumstances did not trigger Miranda, then it is quite clear that the police were holding Petitioner illegally in violation of the Constitution. However, once the police read the warnings to the Petitioner in relation to Rusty Marine, circumstances changed, and the request for a lawyer, by Petitioner, should have cut off questioning.

8. (Slip Op. 20, 21) After the visit to the grave site, Petitioner was permitted to have Betty come to the barracks, where she showed up a little after Petitioner and the police. As she entered the room, with Keating and Hall in the room, Petitioner told her that "he had taken Rusty". He talked with Betty for five minutes and was then asked by the police to sign a waiver and make a statement. His rights were read and Petitioner signed a waiver form.

8A. It may be noted that Petitioner wanted the lower court to examine the waiver for alterations, Miller v. Pate, 386 U.S. 1, 17 L.Ed. 2d. 690, 87 S. Ct. 785 (1967), because he claimed that he signed the waiver on the 30th of October and not on the 31st, as it is dated. Petitioner claims that the date may have been altered, and the numbers (date and time) were placed on the waiver by the same person who dated and timed the waiver that was marked "refused to sign". This person was not present at the time that the waiver was alleged to have been signed.

Additionally, the police, Petitioner, and Betty, were in the room at 2:30 p.m. Keating stated that the Petitioner made his admission at 2:30 p.m. (Tc. 95). Trooper Hornung testified that he heard Petitioner make the statement to Petitioner's girlfriend Betty, and immediately thereafter he signed the waiver, which would be around 2:30 p.m. (Tc. 108-09).

There is yet another significant point. Just prior to the alleged signing of the waiver, she told Petitioner of her unsuccessful attempts to get a lawyer. Petitioner stated,"Thanks for trying, but I'll get a lawyer now when I fill out this form (Public Defender form that brought Patrick Rogan into the case). The police were in the room and admitted hearing this. (Tc. 167,168)

> "If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." Id. at 444-445

> "If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police they must respect his decision to remain silent. Id. at 474.

It must be admitted that it is unlikely that an intelligent person, faced with murder and kidnapping, who knows his rights and shows that his intention is to get a lawyer, would, minutes later, sign away his rights that would protect him.

A point about the waiver. It was alleged to have been signed at 4:00 p.m., one hour and a half beyond the time (2:30 p.m.) that evidence shows it may have been signed, if it was signed at all on the 31st.

9. (Slip Op. 21-23)Now that the police were aware that Rusty had been murdered by Leuschner, in light of the content of his confession, he was apparently suspected of similarly disposing of the missing Troy Krause.

After talking to Betty Larmore, he called for Lt. Keating and asked about the reward, to see if Betty would be entitled to it. When Keating told him that he had no control over the reward, Petitioner made a verbal confession to Betty, with Keating present.

Appellant helped the police search for the missing boy, but they had no success, so Petitioner volunteered to take a polygraph test. He was taken to Easton for the test, returning to Sailsbury for a bond review before Judge Dallas of the District Court there. Judge Dallas advised Petitioner of his rights and cautioned him not to discuss the case with anyone. The next day he went back to Easton to finish the polygraph test.

On the way back to Salifbury, in the back seat of the car, he told Betty the exact location of the boy's burial site, and she relayed this information to the police. Two officers went with Betty, and two other officers brought Petitioner into a woods on a farm in the area. Finally, midmorning (Thursday) November 3rd, Troy's body was found.

9A. The lower court states that the Petitioner was now a suspect in the disappearence of Troy Krause, and, though the Marine matter was concluded, he was being held because the police intended to question him in regards to the Krause matter. As a prime suspect, in total custody, about to be interrogated for incrimination, Petitioner contends that here again the police should have read the Miranda warnings to him before any questioning began. Miranda, at 444; Mosley, at 109-110.

The lower court maintains that there was no requirement nor any legitimate purpose to be served by again reading Miranda, disregarding both Miranda and Mosley, citing Smith v. State, 20 Md. App. 577, 587,(1974) cert. den. 272 Md. 748 (1974), cert. den. 420 U.S. 909 (1975), a case that was ruled on prior to Mosley.

The lower court accedes that the two were connected in the mind of Appellant, but infers that "what went before" shows that Petitioner did not intend to exercise his rights. However, since, in the mind of the Petitioner, all of what went on before consisted of illegal action by the police and denial of his rights, he might well have thought that he could not get his rights from the police, which would be coercion.

However, the contention, aside from the fact that Keating failed to meet the requirements of Miranda and Mosley, is that the illegal conduct of the police invalidated any waiver or atatement, and that a second statement would be improperly influenced by these previous actions.

Clewis v. Texas, 386 U.S. 207, 87 S.Ct. 1338, 18 L.Ed. 2d. 423 (1967); Keller v. State, 2 Md. App. 623, 236 A. 2d. 313 (1967); Canal Zone v. Gomez, 566 F. 2d. 1289, 1291 (5th Cir. 1978); United States v. Womack, 542 F. 2d. 1047, 1051 (9th Cir. 1976); United States v. Nash, 563 F. 2d. 1166, 1169 (5th Cir. 1977); Brown v. Illinois, 422 U.S. 590, 602 (1975).

(a) Tc. 79) (Ta. 101) Keating testified that he questioned Petitioner about Krause, after the conclusion of the Marine issue and admits that he did not read the warnings.

(b) The most significant point comes from Keating (Slip Op. 22). He was in the room when Petitioner told Betty that he took Krause, andhe states, "I questioned him too, as to whether the boy was dead or alive."

It is clear that, as Keating was aware Petitioner's admission, from his talk with Betty, he definately, then, should have read the warnings before he asked Petitioner any questions at all.

Petitioner has been unable to research this point, but is certain that in the State of Maryland, an accused must be given an "Initial Appearance", Rule 723, Appearance, within a certain time(24 hours?). The State claims that Petitioner's appearance before Judge Dallas was merely for a bond review, which does not meet the requirements of Rule 723. If this is indeed the case, then Petitioner's rights were denied.

However, if the State maintains that this was an appearance to satisfy Rule 723 (of which a transcript must be available) it will be noted that Petitioner appeared before the judge without counsel and the judge failed to comply with the requirements of the rule. The judge failed to give him time to obtain counsel (15 days); failed to advise him that if he did not have an attorney in 15 days, a plea of guxl not guilty would be entered; and, at this appearance, the judge entered a plea right then.

Taylor v. State, 20 Md. App. 404 (1974); Williams v. State, 220 Md. 180 (1959); Hill v. State, 218 Md. 120 (1958); Merritt v. State, 221 Md. 118 (1959); Taylor v. 1, (1962).

The opinion states that Petitioner told Betty the exact location of where the boy was buried, and she relayed this information to the police.

It states that two police officers took Betty there, or went with her, and two went with Petitioner. One assumes that this means that all of them went to that location to find the boy's body. However, certain things must be noted, from the records, so the court may understand the truth of the matter because it reflects on voluntariness and waiver in the findings of the lower court. Thus, the issue is significant.

(a) Two police officers, Betty, and Petitioner left Easton at 8:30 p.m. and it was shortly thereafter that Betty told the Police, Bacon, of what Petitioner had told her.

(b) This was Wednesday night, and the boy's body was not found until the morning of Thursday. Since this was the case, it is clear that the Petitioner did not give the exact location of the boy's body.

(c) On Thursday, Petitioner was taken to the woods alone, and after more searching the body was found by the police. No-one considered that the Petitioner might have told Betty that simply because he wanted to ease her mind, because she wanted everything to be over, though the information was fasle.

10. (Slip Op. 25) Because Appellant assert the contrary, we preface this issue by noting that the admissibility of the statements made by Appellant to Betty Larmore is not subject to constitutional standards of voluntarines

There is no contention that Betty Larmore was a police agent. There is the citation, Brown v. State, 10 Md. App. 462, 472-473 (1970) used to show that an overheard statement may be used at trial, because neither of the participants of the conversation was acting under orders from the polic to make the other talk.

10A. Again, it is quite evident that the lower court failed to consider all of the available records and testimony to help with their decision. That the situation in the instant case is different from Brown, Supra, and the case of Hoffa v. United States, 385 U.S. 293 (1966), may be seen from the record and the testimony of Betty Larmore.

(a) Tc.154-55, 162, 175-76,When Betty came to the barracks, before seeing the Petitioner, the police asked her to get the Petitioner to consent to a lie detector test and to confess about Rusty. Before she went in to see the Petitioner in the Krause incident, the police asked her to get him to confess, because he trusted her.

(b) In each incident, the officers who asked Betty to do these things knew that there were police in the room with Petitioner, so it can be reasonablt assumed that they wanted those officers to overhear anything that the Petitioner might say to Betty in response to her questioning and prompting.

This court has ruled that the question of admissibility does not rely on the fact that a person to whom the statements are made is not a law enforcement officer, rather, the question is answered on the basis of the "police participation" in gaining the statements through a police "agent", a citizen whom the police have directed to question a suspect in order to aid the police in their investigation.

In the book, 'A Citizens Guide to Legal Rights', J. Shane Creamer, a chapter deals with this very thing in (Petitioner believes) Alderman, or Alderiso. See also, United States v. Fannon, 556 F. 2d. 961, 965 (9th Cir. 1977).

The factual evidence itself clearly indicates that Betty Larmore was

a police "agent", acting for the police to aid them in their investigation in both the Marine and Krause issues.

11. (Slip Op. 27-34) The lower court's opinion is that the viewing of the body alone is not sufficient coercion to induce a statement; admitting though, that this action was intended by the police to elicit some kind of statement or confession. Maryland's highest courts condone the procedure of having a suspect view the "subject matter", even while admitting that there is a great difference when the subject matter is heroin on the one hand and the dead body of a victim on the other.

The lower court states that "A victim's remains would no more coerce, compell, or improperly induce an innocent person to confess to a murder that he did not commit than a heroin display would coerce, compel, or induce improperly an innocent person to confess to owning narcotics that he did not possess.

The court also states that coercion depends not only on pressure, but on the reaction created by the pressure as well, and decided that all of the circumstances pointed to a finding that Petitioner could not be effected by the viewing of the body.

11A. Such a practice as viewing the body at the murder scene may well have a serious traumatice effect on the person doing the viewing, and though the lower court maintains that such a viewing would not cause an innocent person to confess to the murder, that opinion fails to take two important things into consideration. First, there is a predjudicial assumption that the person doing the viewing is guilty (Slip Op. 35). Second, such a viewing may very well be very traumatic and more dangerous to an innocent person who does the viewing, and though it may have a purpose of eliciting some comment or confession, it is the protection of the innocent that prompts the opinion that "law enforcement officers should use more sophisticated methods of extracting confessions." State v. Peterson, 75 A. 2d. 368 (Maine 1950); State v. Crittenden, 36 So. 2d. 645 (La. 1948), Williams v. State, 22 So. 2d. 821 (Fla.1945); Cavazos v. State, 172 S. W. 2d. 348 (Tex.1943).

Another thing that the lower court fails to consider is that, at the time of the viewing the Petitioner was still an innocent person, and more particularly important, an innocent person who had been denied counsel, as well as been the victim of considerable illegal conduct by the police. As it may very well have been a belief that the police were not going to make any effort to obey the law that prompted the subsequent action, it must be admitted that there was sufficient coercion to render any waiver or statement invalid, because, until the statement, the police were dealing with a person who was innocent. The fact that his rights had been violated, and

the fact that there was no probable cause to hold Petitioner in connection with Rusty Marine, and the fact that the forced viewing was prompted by the police inability to obtain a confession otherwise, make it clear that there was sufficient evidence to support the contention that the statement and the waiver were invalid.

The court must admit that even the will of the strong, intelligent, and knowledgable, may be overcome by the pressures exerted by the police misconduct and inaction, particularly where the Petitioner, admittedly, is well aware of the law and police procedures. Such a person may well be intimidated to a greater extent than the illiterate because he knows what should be done, and when it is not he may well feel completely helpless.

SYNOPSIS

Petitioner has shown, with sufficient evidence, that the lower court has used tainted circumstances for it's finding of voluntariness and waiver. Prior to the circumstances there were illegal arrests; there were violations of State law and procedures; and, there were violations of the Constitution, involving Petitioner's rights.

Petitioner has shown, with sufficient facts, that he requested counsel numerous times, and the police failed to cease questioning, even though these requests were well within the guidelines of the rulings, decisions, and mandates of this court.

Petitioner has shown that he did not wish to discuss the Marine case, contrary to the testimony of Lt. Keating.

Petitioner has shown that the testimonies of Keating and Luce are, in fact, contradictory, and that they should not have been used to help show either voluntariness or waiver.

Petitioner has shown that he was held without probable cause, and, he was extremely predjudiced by the illegal delay which violated Maryland's procedures, Johnson v. State, Supra.

Petitioner has shown that the lower court could not have reviewed all of the records available to support their findings.

Petitioner has shown that Miranda was triggered by the circumstances in this case, and that the lower court did not consider this or other such significant facts in reaching their findings.

Petitioner has shown that the issue of the offer of the phone, used to refute Petitioner's Miranda contentions, was a moot issue, because of the fact that Miranda effectively "cut off questioning" and Petitioner was not obligated to call an attorney so the police could continue to question him about something he did not want to talk about.

Petitioner has shown, by sufficient evidence from the witness who was the one who obtained statements from the Petitioner, that she was acting as a "police agent" because of the fact that there was participation by the police in the obtaining of the statements.

Petitioner contends that he has provided adequate evidence to support his contention that the lower court used extremely tainted circumstances in their findings, and, that the lower court was remiss in their duty by failing to resolve significant issues that reflected upon the circumstances that the court used. Further, Petitioner contends that he has shown, with adequate evidence, that there were sufficient reasons for the lower court to grant Petitioner a reversal, and, because of the illegal arrests, even perhaps a dismissal of the charges against him.

II. THE TRIAL COURT ERRED IN SENTENCING PETITIONER TO LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE.

Maryland Annotated Code, Art. 27, Sec. 643(B)(b), provides that any person who has served three seperate terms for violent crime convictions, shall be sentenced to life imprisonment without possibility of parole.

Petitioner contended that the word "served", as applied here to the statute, means that a person has completed three terms of confinement for violent crimes.

Petitioner contends that, in interpreting statutes the plain meaning of the statute must be effectuated. Further, a statute that is penal in nature must be strictly construed, State v. Fabritz, 276 Md. 416, 421-422, 348 A. 2d. 275 (1975). Applied to the instant case, it is clear that the term "served" has only one meaning, i.e., service that was accomplished in the past. The third confinement here is in the present, not the past, and therefore may not be the basis for the imposition of a mandatory life sentence.

The same result is mandated by means of applying the rule that it is the legislative purpose. "The cardinal rule in the construction of statutes is to effectuate the real and actual intention of the legislature." Fabritz supra at 421. In this case the legislature made its purpose clear at the time it originally enacted the statute:

> "For the purpose of requiring the imposition of a mandatory sentence of life imprisonment for any person convicted of (a felony) certain crimes subsequent to that person having served three seperate terms of imprisonment as a result of three prior (felony) convictions for one of these crimes ." 1975 Md. Laws, Ch. 253

Any doubt that could conceivably exist in the use of "served" is resolved by the promulgation of the purpose: to apply a mandatory sentence to persons convicted of na ed crimes "subsequent to that person having served" the required prior confinements. Subsequent means, "Following in time; comming or being later than something else; succeeding."(Emphasis added). Black's Law Dictionary 1896 (4th ed. 1968) A "subsequent" conviction can only occur in the statutory scheme after the completion of the third sentence. The plain meaning and purpose of Section 643B (b) is to punish specially convictions after three prior confinements. The required conditions simply do not exist in the instant case.

As additional support thereof, it may be noted that the rule (c) that requires a mandatory sentence of twenty five years without parole makes it clear that the legislature did not intend to become embroiled in the confusion and complexity of consecutive sentences.

Additionally, as the lower court points out, Petitioner is a parole violator from his second term in California, and therefore, he would not have completed his second term, which was used as one of the four to make the mandatory sentence applicable. In as much as the trial judge in the instant case did not note that the third sentence was not consecutive to the second, he erroneously applied the mandatory life sentence.

It may be noted that the recent case in Texas, concerning a mandatory life sentence, was upheld by this court, and, in that case the person had completed three prior sentences. The mandatory sentence was not applied in a consecutive manner.

Further, it may be noted, from the records, that Petitioner had not been informed that the State intended to proceed with an enhanced sentence against him, as is required by the law. It was just as the judge was told by the prosecutor about the enhanced sentence that Petitioner knew of it, and, regardless of whether or not Petitioner's lawyer had not informed him of this fact, it is the duty of the prosecutor to make sure that the person to be so proceeded against has notice of that fact in a specified time limit. The purpose of notification is so that the defendant may then prepare his defense against such a sentence. Failure to notify denies the person due process and equal protection.

Because the lower court failed to consider these facts, and has made a ruling that is not consistant with the purpose of the legislature in regards to the mandatory sentence applied in the instant case, Petitioner contends that this court should issue certiorari and remand the case to the lower court for a sentence consistance with the law, but, not to be that of life imprisonment without possibility of parole.

III. THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF SGT. GRIFFITH INTO EVIDENCE AT THE TRIAL.

The lower court states that there was no testimony before the jury relating to the polygraph examination, and, that Akonom v. State, 40 Md. App. 676 (1978), is totally inapposite. Further, no issue was raised as to the coercive effect it may have had as a tool psychological inducement to make a confession.

In the first pleace, Petitioner maintains that the contentions of the Petitioner are that, the testimony of Sgt. Griffith, as to statements made to him by Petitioner, and portions of the testimony of Trooper Gray, are the products of the polygraph examination, that is, the statements were obtained while Petitioner was undergoing the examination, and as such, the results of that examination (statements) are inadmissible because they are unreliable.

In the second place, Petitioner contends that the statements taken during the polygraph examination are inadmissible because of the illegal conduct and actions of the police preceeding the polygraph examination because they violated Petitioner's rights to such an extent that evidence obtained, subsequent to these violations, is the poisoned fruit of those violations. Wong Sun v. United States, Supra, Brown v. Illinois, Supra; Canal Zone v. Gomez, Supra.

As to the evidence before the jury in relation to the statements of Petitioner being obtained by the polygraph examination:

(a) (Slip Op. 23) Petitioner was taken to Easton for the polygraph examination. From Griffith:"...elected to continue with the test and to continue discussing the matter with the police."

(b) Ta. 76, Griffith: Mr. Leuschner advised that he did wish to talk to me in reference to this case.

(c) Ta. 92, Tpr, Gray: He was turned over to Sgt. Griffith, the polygraph examiner. Around 6:30 the evening of the 2nd of November I entered the polygraph room. Mr. Leuschner made statements that in fact he had killed Troy Krause.

From a reading of the testimonies, it becomes quite clear that the testimony of Sgt. Griffith concerned the statements that were made during the polygraph examination, and, part of Trooper Gray's testimony related to what he heard in the polygraph room while Petitioner was taking the polygraph examination. Even though the examination tapes and records of the examination were not introduced at trial, it was evident that these statements were given to Griffith during the examination because this is his sole duty for the Maryland State police at Easton. There can be no doubt that what he testified to was what he had gained during the time of the examination of Petitioner.

As to coercion that prompted the Petitioner to submit to a polygraph test in Easton.

(a) Tc. 161, 163, Betty testified that Petitioner told her that he did not want to take a polygraph test, he wanted a lawyer, but, after he had talked with a lawyer he would do what the lawyer advised.

(b) Ta. 179, Hornung testified that when he asked Petitioner to take the polygraph test, he said that he would like to consult with a lawyer first.

(c) Ta. 163, Betty testified that Petitioner told her that the police said that they would get him a lawyer if he took the polygraph test.

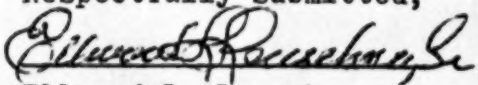
Again, if Petitioner, because of his knowledge of the law, felt that the police, who had shown no desire to obey the laws, would only get him a lawyer if he complied with their wishes, or felt that compliance with police desires was the only way he could gain his rights, then he was, in fact, coerced, and the waivers and statements would be admissible only if they were free of such coercion, and free of any Fifth Amendment violation United States v. Cella, 568 F. 2d. 1266 (9th Cir. 1977); Kirby v. Illinois 406 U.S. 682, 689 (1972); Brewer v. Williams, 430 U.S. 387 (1977).

Because the lower court failed to resolve this issue, and failed to maintain a consistant ruling in accordance with previous decisions and rulings, thus, depriving Petitioner of his constitutional rights, it is contended that this court should grant certiorari and the relief that is applicable to the issue herein.

CONCLUSION

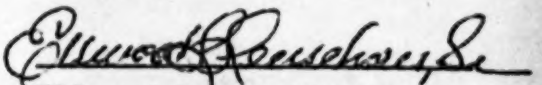
Because of the reasons and arguements stated herein, supported by adequate facts that are available in the records, Petitioner contends that this honorable court should grant certiorari and the appropiate relief.

Respectfully submitted,



Ellwood L. Leuschner, Sr.
Petitioner
146397
954 Forrest Street
Baltimore, Md. 21202

I, Ellwood L. Leuschner, Sr., do hereby certify that on this 14th day of July 1980, a true and correct copy of the foregoing petition was mailed to the Attorney General of Maryland.



Ellwood L. Leuschner, Sr.

RECEIVED
JUL 17 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ELLWOOD LEROY LEUSCHNER, SR.

v.

STATE OF MARYLAND

In the
Court of Appeals
of Maryland

Petition Docket No. 176
September Term, 1980
(No. 945 September Term, 1979
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: July 3, 1980.

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 945

September Term, 1979

ELWOOD LEROY LEUSCHNER

v.

STATE OF MARYLAND

Lowe,
Couch,
Weant,
JJ.

Opinion by Lowe, J.

Filed: April 14, 1980

Elwood Leroy Leuschner was a multiple offender felon who came to Maryland as a fugitive from California justice. His atrocities there were of such nature that his wife by petition alleged him to have been a sexual psychopath causing his commitment to the Mendocino State Hospital which, after 90 days, decided he was not so deranged. Violating his parole after imprisonment, Leuschner emigrated to Maryland where he subsequently kidnapped, sodomized and murdered two young boys, 10-year-old Russell Marine by stabbing and 9-year-old Troy Krause by strangulation.

Despite the attendant violence of crimes of that nature, they are nonetheless clandestine. The witnesses are dead, most physical evidence hidden or destroyed and the only living knowledge of it is locked in the mind of the perpetrator. Though he may be suspected because of his past, he cannot be reapprehended for prior crimes; nor can he be deterred from committing future ones of like nature unless law enforcement officials can somehow discover his misdeeds. The obvious, usually the best, and often the only source, is the perpetrator himself and if a confession can be extracted properly, prosecution and subsequent confinement are reasonably assured.[1] But if that route is followed, officials must tread carefully lest they trespass upon an accused's constitutionally sacred grounds; that which provides him the

---

[1] "[A]dmissions or confessions ... when voluntarily and freely made, have always ranked high in the scale of incriminating evidence ...." Brown v. Walker, 161 U.S. 591, 596 (1896).

privilege not to "be compelled in any criminal case to be a witness against himself ...." U. S. Const. amend. V.

To the extent that this privilege intrudes upon the investigatory aspect of criminal law enforcement, the privilege of silence serves as a checkrein, but not necessarily an unjustifiable restraint, upon police. Even the sanction for involuntarily extracting statements — evidentiary exclusion — is not an unreasonable one in light of the questionable truthfulness of that which was, or might be, coercively extracted by physical or psychological means. However, as the Fifth Amendment right has been interpretively extended, requiring procedural niceties of interrogation formulized to fit precise patterns, it has more and more become an impediment even to legitimate methods of law enforcement. See Harlan, J., dissenting in Escobedo v. Illinois, 378 U.S. 478, 493 (1964).

One such nicety was the blending of the Fifth Amendment right not to speak, with the Sixth Amendment right "to have the Assistance of Counsel for [one's] defense". Initially, the right to counsel for one's defense presupposed an advocate at trial, but was interpretively extended to apply pretrial for an indicted defendant interrogated by the police in a completely extrajudicial environment. Massiah v. United States, 377 U.S. 201 (1964). Perhaps because the exclusionary rule was found to be an effective deterent to opprobrious police conduct in violation of the Fifth Amendment, any statement elicited in the absence of counsel after indictment, regardless of how

elicited, was not admissible at trial against the accused. Ibid. Soon to follow Massiah was Escobedo v. Illinois, 378 U.S. 478 (1964), which extended the right to counsel to a suspect — not necessarily indicted — but from the moment the investigatory phase of an interrogation becomes accusatory and focused upon the suspect.

> "[Where an] investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 US [335 (1963)], at 342, 9 L ed 2d at 804, 93 ALR2d 733, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." Escobedo v. Illinois, 378 U.S. at 490-491.

Escobedo thus interwove the two rights, binding them together with the sanction of exclusion. The final touch to this pattern of protection was Miranda v. Arizona, 384 U.S. 436 (1966), which provided the striated brocade of procedural niceties.

Miranda's holding first appears as simplicity itself,

> " ... the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the

> use of procedural safeguards effective to secure the privilege against self-incrimination." Id. at 444,

but it was the "procedural safeguards" that striated the holding.

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." 384 U.S. at 444.

The Fifth Amendment safeguard was abundantly clear, but that paragraph also suggested that to exercise the Sixth Amendment right to counsel might be a talisman serving to raise the Fifth Amendment shield as well.

> "If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." Id. at 444-445.

The Court then jumps back to the Fifth Amendment.

> "Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." Id. at 445.

Then, presumably because of the application of the similar sanctions, the Court speaks as if the Fifth Amendment privilege and the Sixth Amendment right are one and the same,

> "The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right [Fifth] to refrain from answering any further inquiries until he has consulted with an attorney [Sixth] and thereafter consents to be questioned [Fifth]." Id. at 445 (emphasis added),

and seems to say that a subsequent waiver must be a knowing and intelligent one.

For 45 pages after its initial deceivingly simple holding, the Court sought to explain what was meant, apparently trying to anticipate all situation possibilities of which it could conceive. Again it alternately addressed the right and the privilege in a single paragraph. With regard to the Fifth Amendment privilege not to speak, it said:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." 384 U.S. at 473-474 (footnote omitted).

In the same paragraph it anticipated the exercise of one's Sixth Amendment right to the assistance of counsel.

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. Id. at 474.

Then it concluded those examples with the third possibility, an amalgam of the two.

> "If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." Id. at 474 (emphasis added).

But, contrary to some interpretations, even if both rights are exercised by one upon whom an investigation has focused, the Court did not by that fact alone command the investigators to cease all interrogation. It does, however, place upon them a heavy burden if they wish to use in trial that which they elicit thereafter —

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. at 475.

And the Miranda Court went on to make unequivocally clear that mere silence is not enough to overcome that heavy burden. Id. at 475.

Now, after more than a decade of experience, the Court in North Carolina v. Butler, ___ U.S. ___, 60 L.Ed.2d 286, 292 (1979), explained that the heavy burden of proving a waiver need not be restricted to an express waiver by a defendant, but may be inferred by strong evidence of the circumstances of the interrogation.

> "That [waiver may not be inferred by a silent record] does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."

With these questions of constitutional rights at issue in the case before us, we have independently and carefully reviewed the entire record, Walker v. State, 12 Md. App. 684, 694 (1971). Silent it is not. Unlike the record in Tague v. Louisiana, ___ U.S. ___, 62 L.Ed.2d 622 (1980), the record here fairly shouts at us, as it did to the trial judge, that this case is one from which "waiver can be clearly inferred from the actions and words of the person interrogated." Butler, supra at 292. In so concluding, we scrupulously followed the directive of the Supreme Court which stated in Butler, supra, that

> "when the right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" Id. at 293 (emphasis added).

- Butler's variations on the Miranda theme -

Elwood Leroy Leuschner was convicted in the Circuit Court for Washington County of murdering and sexually offending Troy Krause, a 9-year-old boy. He had previously been convicted in Wicomico County of similarly destroying 10-year-old "Rusty" Marine. See Leuschner v. State, 41 Md. App. 423 (1979). Having exhausted his appeals in the Marine case, his appeal now is from the Krause conviction. Both cases rested upon Leuschner's confessions which were elicited almost simultaneously. His assertions of improprieties in eliciting the confessions compel us to review the entire circumstances and events leading up to both confessions. Following the Butler directive, however, we must first consider him with whom we are dealing.

"background, [and] experience"

Elwood Leroy Leuschner, as we have indicated, has a "background" and "experience" which show, by repetitive exposure, an assimilated knowledge of judicial proceedings and

defendant's rights. In California, as indicated by a four page criminal record, he had been charged with two crimes against children, two rapes, assault and robbery, firearms violation, forgery, burglary, and was a registered sex offender who had been accused but not proven to have been a sexual psychopath. Such background implies a knowledge, whether gained from books or experience, that is a distinguishing circumstance to be considered in determining whether his subsequent conduct was an intentional waiver of a known right. Cf. Escobedo, supra at 491-492.[1A]

"conduct of the accused"

For three months the Maryland State Police in Wicomico County had been searching for a missing 9-year-old boy named Troy Krause, when in late October of 1977, another youngster about the same age, named Russell (Rusty) Marine was reported missing also. On October 29, 1977, while investigating Rusty's disappearance, the State Police were told by Rusty's stepfather that his neighbor, Elwood Leroy Leuschner (the appellant) had last seen Rusty walking down the road toward a dirt pile near their residences. Trooper David Luce went to Leuschner's trailer home and inquired about his recollection of last seeing Rusty. Because Leuschner's niece had previously related that Leuschner had a California criminal record, the trooper, upon returning to the barracks, entered Leuschner's description in a National Crime Information Center Computer and

---

[1A] Underscoring appellant's legal acumen is a handwritten, well organized and perceptive "Supplemental Brief" submitted to his appellate attorney along with a critique of that counsel's brief as previously filed. While there is no provision in our law recognizing the right to file a per se brief supplementing an already filed obviously competent and indeed superior brief by counsel, we acknowledge it as supporting our determination from the record that Mr. Leuschner is legally knowledgeable and practically sophisticated in the judicial processes..

found that he was wanted in California for a parole violation. His criminal record was four pages long.

On October 30, 1977, in the early morning hours Leuschner was arrested (because California would extradite on the outstanding warrants for parole violation) and immediately advised of his rights, which he admittedly understood. He explained to the police that

> "he had been communicating with California authorities in an attempt to get his parole problem straightened out, that he only had one more year left on his parole."

Upon arrival at the State Police barracks he was again informed of his Miranda rights and at that time

> "Mr. Leuschner stated that he wanted an attorney to represent him on the fugitive charges, as he did not want to go back to California; he had a lot to lose: he would lose his trailer, his job, his girlfriend, and so on." (Emphasis added).

No questions were asked of him regarding the fugitive charge; however, he was routinely processed and subsequently taken to the Criminal Investigator's office. There he was questioned

> "concerning any information he may have [had] as to the location of the missing boy, Rusty Marine."

It is significant to note that his previous request for an attorney was expressly in regard to the fugitive charge only.

That request for counsel was "scrupulously honored" as a triggering mechanism for his "right to cut off questioning" in regard to the charge for which he was arrested; however, he willingly agreed to discuss the missing boy. See Michigan v. Mosley, 423 U.S. 96 (1975).

> "Q. Did he say anything to you about an attorney at that time?
> A. Just for the fugitive charge.
> Q. What do [you] mean? What did he say?
> A. He said he would like to have an attorney represent him for the fugitive charge, because he did not want to go back to the State of California.
> Q. Did he indicate to you at that time whether or not he was willing to talk to you about Rusty Marine?
> A. Yes, sir. He was willing, and he stated that he would be perfectly willing to talk to us; that he didn't have any information concerning the location of where the missing person was.
> Q. What, if anything, did he tell you concerning an attorney with respect to talking to you about Rusty Marine?
> A. He did not [sic[2]] say he did not desire an attorney; he didn't need one.
> Q. Did he say that?
> A. Yes, sir, he did."

No questions were asked of Leuschner as to Troy Krause. The sole concern was directed to the missing neighbor Rusty since Leuschner was the last to have seen him. Presumably, little if any connection was known between Leuschner and Troy.

---

2 It is apparent from a contextual reading of the record that the word "not" was inadvertent either on the part of the witness or the stenographer. The meaning was abundantly clear and expressed elsewhere that Leuschner did not want an attorney for any purpose except the fugitive charge.

During this time, Betty Larmore, the paramour with whom appellant resided, came in and was permitted to be with, and talk to, Leuschner. Leuschner relayed his request for the retention of counsel to her.

> "Q. What, if anything, did they talk about?
> A. Mr. Leuschner requested that Betty Jean obtain an attorney for him.
> Q. Did he indicate to her why he wanted an attorney?
> A. Yes, sir, because he did not want to go back to California; that they would have too much to lose.
> Q. What, if any, response did Miss Larmore give him at that time?
> A. At that time she said that she couldn't do anything about getting an attorney due to the day it was.
> Q. What day was it?
> A. That was Sunday. However, she would go the next day and attempt to get him one. I believe, I was answering the telephone, but I believe at that time a piece of paper with an attorney's name was written down and given to Miss Larmore.
> Q. By whom?
> A. By Mr. Leuschner.
> Q. Other than passing the piece of paper to Miss Larmore, did Mr. Leuschner respond in any way to her indication that she would be unable to do anything about an attorney until the next day?
> A. No, sir."

With M's Larmore still there, the conversation to determine the whereabouts of the missing Rusty resumed. Discrepancies from Leuschner's previous interviews became apparent but nothing incriminatory or accusatory with regard to Rusty was elicited. Cigarettes, sandwiches and coffee were provided Leuschner around

4:00 o'clock. From that time until 6:00 or 6:30, Lt. Keating, who was called in to

> " ... assist in the investigation of a missing person named Rusty Marine",

participated in the inquiry with the help of TFC Milton Hall. They were also familiar with the missing Krause boy, but again the focus of investigation was only upon Rusty. Out of an abundance of caution, prior to any discussion, they too advised appellant of his Miranda rights. Leuschner never indicated a desire to stop talking about Rusty; but about an hour after Lt. Keating arrived, he recalled that

> "Mr. Leuschner said 'I would like to have an attorney'."

Although the police were not yet aware that either of the boys had been criminally abused,[3] Lt. Keating again choosing to err, if at all,

---

[3] Until the next day the police did not know if the boys were alive or dead, safe or sound, restrained or free, or simply run-a-ways. The police were simply seeking information about one of the boy's whereabouts from the last person known to have seen him. Although it is apparent that the police had more than a passing interest in Leuschner and obviously had some suspicion that he was not disclosing all he knew about the missing Rusty, in a criminal sense he was not focused upon as an accused. Escobedo v. Illinois, 378 U.S. 478 (1964). Had Leuschner not been lawfully in custody as a fugitive, he could not have been held or charged as an accused in the absence of some probable cause by the police to believe he had committed a crime. While one may be a suspect in an investigatory sense, he could hardly be focused upon as an accused until a crime with which he might have been connected is known to have been committed — by someone.

But we are reciting the "particular facts and circumstances" upon which waiver must be decided if a criminal investigation had begun to focus on the accused. We will continue selectively to set out the testimony of what transpired, keeping in mind, however, the "fact" that there is as yet no crime known to the police as to either boy — there not having even been a question asked regarding Troy.

on the side of prudence, immediately acquiesced:

> "Q. What, if anything, did you do when he said that?
> A. He was sitting right next to the telephone, and I advised him: 'Mr. Leuschner, there's a telephone. You can call an attorney, or I'll call one for you.'[4]
>
> . . .
>
> A. The telephone was within arm's reach of him, sitting on the desk.
> Q. Did you make any comments to Mr. Leuschner about the telephone?
> A. Did I make any?
> Q. Yes.
> A. I told him that he could use the telephone to call an attorney, or I would call one for him.
> Q. Did he make any effort to use the telephone?
> A. No, sir.
> Q. Did he ask you to call an attorney for him?
> A. No, sir.
> Q. Did he make any effort to use the telephone directory?
> A. No, sir.
> Q. What, if anything, occurred after you advised him that he could use the telephone?
> A. He said he wanted to talk to Betty."

---

3 (Cont'd)

Consequently, appellant's Sixth Amendment right "to have the Assistance of Counsel for his defense" had not come to fruition.

4

It should be noted that no case has as yet placed the burden of providing counsel upon the police. It is the denial of a request to permit an accused to contact counsel that violates the constitution, Crooker v. California, 357 U.S. 433 (1958), and Lt. Keating obviously provided ample opportunity and assistance to effect that purpose. Nor is there a per se rule as appellant would urge upon us that the police must terminate any contact with an accused unless counsel is present, once a request for counsel is made. Michigan v. Mosley, 423 U.S. 96 (1975). It is unlikely that Maryland would follow the dissent in Mosley, as urged by appellant, since Maryland does not go that far even after indictment. State v. Blizzard, 278 Md. 556 (1976), but see Brewer v. Williams, 430 U.S. 387 (1977).

Betty Larmore was in the next room and was immediately brought in. Appellant voluntarily continued his conversation without the instigation of any further questions being asked by the officers.

> "Q. How long did he talk to Betty Larmore?
> A. Fifteen, twenty minutes.
> Q. Were you present in the room when he talked to Betty Larmore?
> A. Yes, sir.
> Q. Do you know what they talked about?
> A. When she came into the room, I didn't get all the conversation, but he did ask her if she would contact an attorney or had she contacted an attorney.
> Q. Do you recall what she responded?
> A. No, I don't believe I can say what she said. She might have mentioned the name of an attorney, but I'm not sure."

Although Trpr. Hall's testimony indicated that

> " ... he did not desire to talk any further; he wanted to contact an attorney",

Lt. Keating's testimony was clearly and pointedly that he did not express any desire to terminate the inquiry,

> "Q. Did he ever at any time during that two or two and a half hours indicate at any time a desire to cut off questioning?
> A. No, sir.",

but neither did he express a desire to continue. He simply kept right on talking.[5]

---

[5] Whether or not appellant expressly exercised his Fifth Amendment privilege as well as his Sixth Amendment right, the trial judge believed the testimony that no further questions were asked, and we find no reason to believe the contrary.

"Q. After he talked to Miss Larmore, what, if anything, occurred?
A. He just kept carrying on general conversation.
Q. With whom?
A. With Trooper Hall and myself, and Betty was in there.
Q. How did the conversation get started?
A. He just kept talking that he didn't know anything about Rusty Marine.
Q. How long a period of time transpired from the time he stated that he would like an attorney to the point where he started talking again?
A. The conversation never stopped. It was just a continuous conversation with Betty when she came in, and he'd speak to myself or Trooper Hall.
Q. Did the conversation get back to the subject of Rusty Marine?
A. Yes, sir.
Q. Did it ever leave the subject of Rusty Marine?
A. No, sir.
Q. Between the time that Mr. Leuschner stated that he would like an attorney and the next time that he said anything to a Police Officer, did either you or Trooper Hall or any other Police Officer ask him any questions?
A. No, sir."

But perhaps because of the discrepancies in Leuschner's narrations, Trpr. Hornung, who was also participating in the search for Rusty, asked Leuschner

" ... if he had any knowledge of the whereabouts of Rusty, and at one point in the conversation I asked him if he would be willing to take a polygraph.
Q. About what time of day was that?
A. That would have been some time after 7:30 p.m.
Q. What, if any, response did he make to your suggestion concerning the polygraph?

A. He said that before he would submit to a polygraph examination he would have to discuss it with an attorney.
Q. Did he indicate why?
A. No, he just said that he did not ... it was not his desire to take a polygraph without first consulting with an attorney."

As a consequence nothing more was said to him about such a test.

"Q. Did you say anything further to him at that time or thereafter concerning a lie detector test?
A. No, sir."

And the day concluded by appellant being taken before a district court commissioner for charging on the fugitive warrant where once again he was provided his Miranda warnings.

These were the references made by appellant expressing a desire for counsel. In the first instance he restricted his request solely to the fugitive charge and volunteered to help with the search for the missing boy, Rusty Marine. The officers honored the second more general request by refraining from questioning further and by offering assistance in procuring counsel. Appellant, instead of accepting the officers' assistance, preferred to talk again with Betty whom he had commissioned to get him counsel for the fugitive charge which she expressed an inability to do because it was the Sabbath. Prognosticating this precise possibility, it will be recalled, Miranda said:

"If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." 384 U.S. at 474 (emphasis added).

But Leuschner did not indicate that he wanted counsel before speaking further to the police. On the contrary, without any prompting, appellant's continued conversation of the subject under inquiry, both to Betty Larmore in the presence of the police and to the police, belied any inference that he was exercising his Fifth Amendment right. As in North Carolina v. Butler, supra, there was no doubt that appellant had been adequately, effectively, and frequently apprised of his rights; the only question was whether his conduct waived them. The test was first espoused in Carnley v. Cochran, 369 U.S. 506, 516 (1962), and quoted in Miranda, 384 U.S. at 475.

> "'The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'"

Here, as in Butler, the actions and words of the appellant clearly implied a knowing and intelligent waiver of the rights of which he was repeatedly advised and from his extraordinary past experience must have been keenly cognizant.

Having found so clear a waiver of counsel, we note in passing that it is questionable whether Leuschner was entitled to counsel (regarding the missing Marine boy) at the time of his request. Throughout that entire day there was no crime known for which Leuschner could have been focused upon as a suspect. The Sixth Amendment right is a right of an accused, at least in jeopardy of a portending criminal proceeding. Escobedo extended the right from one formally accused (Massiah, supra) to one focused upon as a suspect. No case has yet provided the right as

constitutionally available upon a missing person inquiry, absent knowledge that a crime has been committed. If that were the law, not only would legitimate methods of criminal law enforcement be "unjustfully fettered" (as concerned Justice Harlan in Escobedo), public protection would, in manacles and leg irons, be itself imprisoned. But even if he were entitled to counsel in regard to the missing Rusty Marine, presumably even the police had made no connection between Leuschner and Troy Krause; no suspicion was expressed or indicated by even a single question.

It would be judicially naive to infer that the police had not focused their attention upon appellant in regard to Rusty, especially in light of Leuschner's record; however, the investigation could hardly turn accusatory, even as to Rusty, until some knowledge that a crime has been committed is apparent to the police. That precise point

> "when the process shifts from investigatory to accusatory ... our adversary system begins to operate ...." Escobedo, supra at 492.

psychological stimulation or psychological coercion

The next day, Monday, October 31, 1979, appellant was brought from the jail where he had been confined as a fugitive, back to the barracks for further questioning. He was advised of his Miranda rights which he acknowledged having previously heard and that he understood them. During this interview Lt. Keating was advised that Rusty Marine's body had been found.

Leuschner was told but, still indicating that he didn't know anything about it, expressed disbelief. Perhaps to convince him,

> "[w]e talked it over, Sgt. Luce and myself, and it was my opinion that Mr. Leuschner didn't believe anything we were telling him, and I thought if we took him down there and showed him that the body had been recovered, then he'd know that we knew what we were talking about or telling the truth";

perhaps because now the commission of a crime by someone had surfaced and suspicion focused on appellant, he was taken to the scene. The reaction of appellant, now that it was known that a crime had been committed, was itself sufficient to focus suspicion upon him as an accused even absent his record.

> "He had, by the time I saw him, had seen the body, and had become very upset, physically upset. I turned him away from the body at that time and attempted to calm him for several minutes. We left very shortly thereafter."

Prudently, if not necessarily, no questions were posed at this time.

> "Q. Did you ask him any questions?
> A. No, sir.
> Q. Did he say anything of an incriminatory nature?
> A. No, sir. He was just very shaken."

Upon returning to the barracks appellant was permitted to stop by his trailer and ask Betty Larmore to come with him. She arrived a little after he did, and upon her entry into the room appellant told her, in the presence of Hall and Keating, that "he had taken Rusty". He continued to talk with Betty for five or ten minutes and was then asked by police if he would give them

a statement. Miranda rights were repeated and appellant then signed a waiver form, witnessed by Betty Larmore, prior to giving the statement. Indeed, appellant himself typed part of his statement which described that which he had done to Rusty Marine culminating in the boy's murder. To this point, still no inquiry had been made with regard to Troy Krause with whom we are here concerned, and when Leuschner was now asked about him, upon concluding the Rusty Marine confession, he at first denied any knowledge and again asked to see Betty Larmore.

the case we are considering

Now that the police were aware that Rusty had been murdered by Leuschner, in light of the content of his confession, he was apparently suspected of similarly disposing of the missing Troy Krause. After talking to Betty Larmore, he called for Lt. Keating and asked him, not for a lawyer, nor to recant his former Miranda waiver, but

> "if Betty could give information with reference to Troy Krause, would she be entitled to the $5,000 reward."

This conduct itself indicates that even at this crucial juncture in the extrajudicial proceedings, the experienced and court-wise accused was capable of conniving for additional benefits as prerequisite to further confession. When the Lieutenant replied that he had no control over the reward offer, appellant

> "turned to Betty and said words to the effect that 'I took him, too.'

. . .

> "When he said that, Betty sort of cried out 'No, you didn't' or 'You couldn't.' He said 'Yes, I took him.' He started telling me in her presence what had happened, where he picked him up on the road, and the boy wanted a ride to the YMCA, and as soon as the boy got in the truck he made a right turn, he didn't know the name of the road. He said shortly thereafter he made another right turn and came to a place where he could pull off the side of the road. He got out of the truck, and he said he could see the roof of an old home or a large home which was red. The roof was red. He said he couldn't see the whole house, he could just see part of the roof. He said he pulled the boy out of the truck and tied his hands and took him a short distance in the woods, approximately fifty yards and had sex with him. He said he held his hand over his mouth, and when he left the boy was laying on the ground.
>
> I questioned him, too, as to whether the boy was dead or alive, and he said he didn't know; that he was just laying there."

Appellant then agreed to help the police locate Troy and they left the barracks guided by appellant's direction. They found nothing and returned just before midnight. Precipitously appellant was presented to a commissioner and charged with the murder of Rusty Marine.

The next morning Lt. Keating, Trpr. Lewis, Betty Larmore (whom they picked up at her home) and Leuschner again "rode around", presumably with Leuschner trying to recall where he had left Troy. Leuschner, apparently recalling the polygraph discussion the previous day, asked then to take the test

> "to see if it would assist him and help, and he wanted to do everything he could to locate the Krause boy."

Appellant was then taken to the Easton barracks for the polygraph test, after which he was returned to Salisbury for a bond review before "Judge Dallas" of the District Court there. Judge Dallas not only advised appellant of his Miranda rights but

> "[h]e advised him not to talk to the police or anyone about this."

The next day, Wednesday, November 2nd, appellant was taken back to Easton to continue his polygraph examination. The examiner again advised appellant of his rights,

> "at which time Mr. Leuschner advised me that he was familiar with the rights and further that he had been advised by Judge Dallas to not to talk to the police and not to take any type of test; however, he wished to clear this matter up; he wished to help locate the body of Troy Kruase; and therefore elected to continue with the test and to continue discussing the matter with the police."

Appellant even had the police try to find him a hypnotist to help him remember the location where he had left Troy, but they were unsuccessful.

Upon returning from Easton, Leuschner rode with Betty in the back seat. That night Betty called the officers and told them that appellant had given her exact directions to Troy's body. Two officers went with Betty; two others brought appellant into a woods on a farm in the area. Finally, midmorning (Thursday,

November 3rd) Troy's body was found.

In the early afternoon an arrest warrant was obtained and, in the presence of a public defender who had recently appeared for appellant, was served upon him. He was promptly presented before the district court judge.

From our review of the circumstances it is clear, especially in regard to the Troy Krause crime, when appellant requested counsel on October 30th, appellant had not been focused upon as an accused sufficiently to trigger his Sixth Amendment right to counsel. Escobedo, supra. But even if that were not so, it is equally clear from his words and conduct that before confessing or even before a single question was asked regarding Troy Krause, appellant, in writing, waived his Miranda rights. Butler, supra.

peripheral Miranda issues

Although appellant contends that the Krause confession was inadmissible because the Miranda advisements were not given between the conclusion of his statement on Rusty Marine and the commencement of his admissions as to Troy Krause, we think the contention a specious one. Having obviously argued that the two were "connected in appellant's mind" — a premise to which we had to accede simply to address the foregoing concerns — he can hardly now be heard to argue that the dozen or so warnings given and the waiver signed just prior thereto, were not valid, recalled and clearly understood by appellant. Under the circumstances of this case, the waiver was so interrelated by time and circumstance, Miranda warnings having been repeatedly given by the same interrogators, there was no requirement nor legitimate purpose to be served by again administering them. Smith v. State, 20 Md. App. 577, 587 (1974), cert. denied, 272 Md. 748 (1974), cert. denied, 420 U.S. 909 (1975).

Finally, in the Miranda regard, appellant contends that because no fugitive warrant was obtained pursuant to Md. Code, Art. 41, §§ 28 and 28A, his initial arrest was illegal and the statements were inadmissible as the fruit of such illegality. Appellant having failed to raise this below has for practical purposes waived it on appeal.[6] Md. Rules 736 and 1085.

- traditional concepts of voluntariness -

Betty Larmore

Because appellant asserts the contrary, we preface this issue by noting that the admissibility of the statements made by appellant to Betty Larmore, his paramour, is not subject to constitutional standards of voluntariness. There is no contention that Betty Larmore was a police agent.

In Brown v. State, 10 Md. App. 462, 472-473 (1970), cert. denied, 261 Md. 722 (1971), we found no fault even with permitting an officer to testify to that which he had overheard spoken between two inmates in a contrived setting in jail. We noted that:

> "Here it is clear that the incriminating statements were not the product of any sort of coercion, legal or factual, physical or psychological. The conversations of Brown and Montgomery were wholly voluntary. Nothing said by either was prompted,

---

[6] As pointed out in appellee's brief, the record indicates compliance with the statute in any case.

inspired or solicited by Elliott [the undercover policeman] nor was it caused by or the result of any questioning of either by the officer. On the contrary the evidence is that he never even spoke to them. They simply talked without threat, promise or inducement on the part of the authorities in such circumstances that what they said could be overheard. Elliott, in a position to overhear, was under no obligation to close his ears. As the Court said in Hoffa [v. United States, 385 U.S. 293 (1966)], supra, at 303, quoting with approval the words of the dissenting opinion in Lopez v. United States, 373 U.S. 427, at 465:

> 'The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.'

We hold that the receipt of Elliott's testimony with regard to the conversations of Brown and Montgomery did not violate the Fifth Amendmend right against self-incrimination. See Jefferson v. State, 228 Md. 331.

. . .

Even if the cell into which Brown and Montgomery went to converse be considered a constitutionally protected area, Elliott did not intrude therein physically and there was no electronic bugging. Nor was he in any sense a trespasser by his position in the tier aisle when he overheard the conversations. The Supreme Court said in Hoffa, at 302: 'Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.' Certainly then, it cannot protect the wrongdoer voluntarily confiding his wrongdoing in such a manner that he can be overheard by a third person legally in a position to overhear. See also Lewis v. United States, 385 U.S. 206." 10 Md. App. at 472-474.

See also Leuschner v. State, 41 Md. App. at 429-434 (cert. denied, __ Md. __ (April 23, 1979), cert. denied __ U.S. __ (October 29, 1979).

The exclusionary rule is simply not applicable as to the statements made to Betty Larmore either in the presence of the officers or out of their hearing; but because we will affirm the use of appellant's confessions to the police, that ruling is hardly necessary.

Go back to 20

the viewing

Appellant contends that the first inculpatory statement he made to Betty Larmore and the police regarding Rusty Marine, i.e., that "he had taken Rusty", was the involuntary product of a psychological coercion emanating from the graveside viewing of Rusty Marine's body, and as such was inadmissible. See State v. Kidd, 281 Md. 32, 36 (1977), cert. denied, 434 U.S. 1002 (1977). Quoting Combs v. State, 237 Md. 428, 435-436 (1965), he proceeds to reason that

> "where one confession is held to be involuntary and inadmissible, the State must overcome a presumption that the improper influence which produced the first confession is still in effect until a cessation of that influence is definitely shown, and the evidence to overcome and rebut such a presumption must be clear, strong and satisfactory, and any doubt on this point resolved in favor of the accused." 7

---

7 See also Clewis v. Texas, 386 U.S. 707 (1967); United States v. Bayer, 331 U.S. 532, 540 (1947); Jackson v. State, 209 Md. 390 (1956); Edwards v. State, 194 Md. 387 (1950); Fried v. State, 42 Md. App. 643 (1979); Brown v. State, 6 Md. App. 564 (1969); Wiggins v. State, 4 Md. App. 95 (1968), cert. denied, 251 Md. 753 (1968); Keller v. State, 2 Md. App. 623 (1967). Fried, supra, makes it clear, however, that the taint doctrine does not apply to mere Miranda violations.

While appellant alleges several factors contributing to the "psychological coercion", he discusses but one — "the act of taking appellant to the grave of Rusty Marine and showing him the body", aggravated by "continuous questioning". He contends that the six sessions on the first day of arrest (consuming approximately the same number of hours of interrogation) culminating in the act intending to shock a confession from the accused the following morning, must, in combination, be seen as psychologically coercive. He relies primarily upon a series of cases in other jurisdictions which have considered viewings of victims' corpses and "found that this technique, which seems always promptly to produce a confession, renders that confession involuntary. See e.g., State v. Peterson, 75 A.2d 368 (Maine 1950); State v. Crittenden, 36 So.2d 645 (La. 1948); Williams v. State, 22 So.2d 821 (Fla. 1945); Cavazos v. State, 172 S.W.2d 348 (Tex. 1943)."

We note initially that the mere viewing alone is by no means sufficient "coercion" to induce an accused to confess involuntarily. That which was viewed, of course, was the subject matter of the crime, the commission of which we will assume appellant was by then suspect. Showing him evidence of the subject matter was obviously intended by the police to elicit information, an investigative technique which has become a "standard procedure of interrogation" condoned by this Court in Vines v. State, 40 Md. App. 658 (1978), and the Court of Appeals affirming in Vines v. State, 285 Md. 369 (1979). See opinion dissenting on Miranda grounds in 40 Md. App. at 672. In that case, Jasper Vines was

convicted of possession of heroin. The heroin contained in tinfoil packets, the subject matter of that crime, had been legally obtained under warrant from Vines' home and was displayed by the police to Vines, after he had invoked his Miranda rights, to elicit an inculpatory admission.

This Court and the Court of Appeals both condoned that police procedure, holding that it neither violated Miranda nor consisted of involuntary psychological coercion. In regard to the issue of voluntariness in the traditional sense, our majority's reasoning was adopted by the Court of Appeals.

> "'It is not disputed that shortly before making the inculpatory disclosure, [Vines] had been fully apprised of his right to remain silent and that anything he said might be used aginst him in a court of law. It is also undisputed that he understood those rights. Merely because the police entertained the hope (not expressed to [Vines]) that the display of narcotics would produce an incriminating statement does not mean that in allowing [Vines] to view the display they were improperly compelling, coercing, or inducing [Vines] to speak.' . . . Vines, 40 Md. App. at 661." Vines v. State, 285 Md. at 380-381 (emphasis added).

Because of the western world's ingrained belief in the sanctity of human life, the viewing of a child's cadaver recently exposed in a shallow grave is psychologically more grotesque than a viewing of heroin recently possessed by an accused; but both viewings are purposed to the same end, i.e., to elicit a confession. The viewing procedure itself is not conclusive of

involuntariness, Vines, supra. A victim's remains would no more coerce, compel or improperly induce an innocent person to confess to a murder that he did not commit than a heroin display would coerce, compel or improperly induce an innocent person to confess to owning narcotics that he had not possessed.

Of course, the statement in Kidd, supra, relied on by appellant, that a confession may be rendered involuntary by either psychological or physical coercion is constitutionally supported by any number of Supreme Court opinions. Eg., Blackburn v. Alabama, 361 U.S. 199 (1960); Fikes v. Alabama, 352 U.S. 191 (1957); Watts v. Indiana, 338 U.S. 49 (1949) separate opinion; Upshaw v. United States, 335 U.S. 410 (1948). The contemporary responsibility of law enforcement officers to use more sophisticated methods of extracting confessions makes our review of the circumstances surrounding a confession more difficult because of the more delicate judgments to be made. Spano v. New York, 360 U.S. 315, 321 (1959). Thus, the range of inquiry in this type of case must be broad and the Supreme Court insists that the judgment in each instance be based upon the "totality of circumstances". Blackburn, supra at 206. Whether psychological coercion exists depends not only on a circumstance of pressure exerted but the effect of that pressure vis-a-vis the power of resistance of the person confessing. Fikes, supra at 197.

> "What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." Stein v. New York, 346 U.S. 156, 185 (1953).

And as we conduct our independent review of the record, mandated by the Supreme Court, see Walker v. State, 12 Md. App. at 694, we are not restricted to that which is revealed at the suppression hearing prior to admission of the confession but may — and should — review the record in its entirety from stem to stern.

> " ... [W]e reject the notion that the scope of our review can be thus restricted. Where the involuntariness of a confession is conclusively demonstrated at any stage of a trial, the defendant is deprived of due process by entry of judgment of conviction without exclusion of the confession." Blackburn, supra at 210.

Obviously then, if such review is mandated from the defendant's view, the sauce for the goose is so for the gander as well. If we are to review the entire record for circumstances indicative of involuntariness, we should range that far in the record for evidence of voluntariness as well. Justice is (or should be) concerned with the truth, whether it convicts or exonerates. In this case such latitude will help us to determine whether appellant is one "weak of will or mind" easily overpowered by psychological pressures or whether he is "an experienced criminal" against which such devices would be "utterly ineffective". At the time of this review we know from information derived at sentencing, as well as testified to in the suppression hearing, that Leuschner had been thrice convicted of violent crimes prior to his conviction in this case. Beyond that,

he was convicted of nonviolent crimes and was a fugitive from California justice. He is, as pointed out by the trial judge, and as indicated above, court-wise and experienced in the system.

In the light of that experience, we then look at the circumstances giving rise to the confession, Bram v. United States, 168 U.S. 532 (1897).[8] There is presumably no restriction upon factors that may be considered but the cases generally have emphasized those which should not be overlooked. These include: 1) the accused's age, Spano, supra; Chambers v. Florida, 309 U.S. 227 (1940); 2) his character, Harris v. South Carolina, 338 U.S. 68 (1949); 3) his record as to former crimes, Spano, Stein and Fikes, all supra; 4) educational background, Ward v. Texas, 316 U.S. 547 (1942) and Spano, Harris and Fikes, all supra, but see Lisenba v. California, 314 U.S. 219 (1941), indicating that intelligence and business experience may offset lack of formal education; 5) mental capacity, Payne v. Arkansas, 356 U.S. 560 (1958); Brown v. Mississippi, 297 U.S. 278 (1936) and Lisenba, Ward and Fikes, all supra; 6) the legality or illegality of arrest, Payne and Ward, both supra; 7) the conditions of his incarceration, Payne, Watts and Fikes, all supra; 8) delay in presentment to a commissioner, Johnson v. State, 282 Md. 314 (1978); 9) removal to a distant jail, Ward and Fikes, both supra; 10) prolongation of interrogation - see, e.g., Ashcraft v. Tennessee, 332 U.S. 143 (1944); Turner v. Pennsylvania, 338 U.S. 62 (1949) and Leyra v. Denno,

---

8 Oddly, in doing so we may even consider events which occurred after the confession was obtained. Haley v. Ohio, 332 U.S. 596 (1948).

347 U.S. 556 (1954); see also Ward, Blackburn, Spano, Harris and Fikes, all supra, but compare Brown v. Allen, 344 U.S. 443 (1953) and Lisenba, and Stein, both supra, see also comment note 69 L.Ed. 131 - with deprivation of refreshment, rest or relief, Payne, Watts and Stein, all supra, by relays of interrogators, Fikes, supra, while isolated for a substantial time, ibid, without counsel, friends, relatives or disinterested persons, Blackburn, Spano, Payne, Fikes, Chambers and Harris, all supra; and 11) the failure to warn or apprise the accused of his rights, Payne, Watts, Harris, Turner and Haley, all supra.

It is important to emphasize that none of these factors standing alone would have been conclusive. In this case, standing alone, no single factor was so dominant even so as to give us pause. The interrogation was not so prolonged or unremitting as to place undue physical or mental strain on appellant who was a mature, intelligent and court-wise person, and

> "not young, soft, ignorant or timid. [He was] not inexperienced in the ways of crime or its detection, nor [was he] dumb as to [his] rights." Stein, 346 U.S. at 185-186.

To the contrary, he was reapprised of his rights each time his location or interrogators changed. That there were different interrogators at different times is not sufficient to indicate an overbearing of appellant's will by "relays" used to wear him down. See Lisenba, supra. The Supreme Court has

> "never gone so far as to hold that the Fourteenth Amendment requires a one-to-one ratio between interrogators and prisoners, or that extensive questioning of a prisoner automatically makes the evidence he gives in response constitutionally prohibited." Stein, supra at 185.

Appellant was legally arrested as a fugitive, apprised repeatedly of his rights, granted an opportunity to call an attorney, permitted to see and be with his paramour, uncaged, courteously treated and refreshed by food, drink and tobacco. To preclude a confession obtained by such an interrogation, under these circumstances, is to deny the use of interrogation as a police tool.

> "Interrogation is not inherently coercive, as is physical violence. Interrogation does have social value in solving crime, as physical force does not. By their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means to solution of crime. The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness. This Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive.
>
> Of course, such inquiries have limits. But the limits are not defined merely by calling an interrogation an 'inquisition,' which adds to the problem only the emotions inherited from medieval experience. The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." Stein, supra at 184-185 (footnote omitted).

NOTE GUILTY PERSON!

Nor did the viewing of the victim at the burial scene, alone or in circumstantial context, imply that the appellant's will was overpowered. As acknowledged in Vines, it was obviously an inducement to a confession by a guilty person, but hardly so to an innocent one.

So much concludes our response to appellant's first issue which was:

> "I. The trial court erred in admitting into evidence numerous inculpatory statements made by Appellant.
> a. implicitly ruling that they were voluntary.
> b. ruling that they were made in compliance with Miranda.
> c. overlooking the question of whether they were the product of an illegal arrest."

The twelve issues that follow require less need for verbosity to address. The issues remaining are:

> "II. The trial court erred in sentencing Appellant to life without parole.
>
> III. There was insufficient evidence to sustain the verdict that Appellant was sane.
>
> IV. Appellant was denied his constitutional right of confrontation, along with evidentiary and procedural rights.
>
> V. The trial court erred in permitting Sgt. Griffith to testify as to statements made by Appellant.
>
> VI. Appellant was deprived of a fair trial by the prejudicial remarks made by the prosecution in closing argument.

VII. The trial court erred in failing to conduct individual voir dire of the jurors on the issues of prejudicial pretrial publicity and prejudice relating to the defense of insanity.

VIII. Appellant was prejudiced by the instructions to the jury.

IX. The evidence was insufficient to sustain the convictions.

X. Appellant was tried on an indictment that was illegal, duplicitous, and insufficient.

XI. Appellant was tried illegally on the 'greater charges' relating to Troy Krause following their severance from the 'lesser charges' relating to Russell Marine.

XII. Appellant was illegally tried in violation of Maryland Rule 746.

XIII. Appellant was denied the adequate assistance of counsel.",

and we shall address them briefly seriatim.

- the sentence -

Appellant's complaint of an illegal mandatory sentence is without foundation. Md. Code, Art. 27, § 643B (b) provides that any person who has "served" three separate terms for violent crime convictions, shall be sentenced to life imprisonment without parole possibilities. His argument is that he has not "served" three sentences because even counting the two rape convictions in California (from which he is a parole fugitive)

as being "served", the third sentence was for the murder of Rusty Marine. Even if the Rusty Marine sentence requires completion as the third under the statute, however, appellant will not have commenced serving his Krause sentence until that third sentence has been "served". The Krause sentence being consecutive so ordains.[9]

YES

- sanity -

Appellant's attack upon the sufficiency of the evidence to prove appellant sane is merely a questioning of the relative weights that he feels should be given the opinions of the experts who testified. Our review clearly indicates that there was ample from which a factfinder could conclude appellant was sane, beyond a reasonable doubt. Jackson v. Virginia, ___ U.S. ___, 61 L.Ed.2d 560 (1979).

NO

- the psychiatric testimony -

Appellant attempts to seize upon our holding in Gregory v. State, 40 Md. App. 297 (1978), that psychiatric reports containing opinions of absent witnesses are improperly admitted

---

9 Appellant also attempted by footnote to raise a constitutional attack on the statute. We have chosen the same means to apprise him that we will not address that constitutional question since it was not raised and decided below. von Lusch v. State, 279 Md. 255, 262-263 (1977); Vuitch v. State, 10 Md. App. 389, 397-398 (1970), cert. denied, 261 Md. 729 (1971), cert. denied, 404 U.S. 868 (1971).

over objection in violation of the right of confrontation; however, appellant has waived that claim by failing to make a timely objection below and by having instigated the evidence he now deplores. Leonard v. State, 36 Md. App. 385, 387 (1977); Sutton v. State, 25 Md. App. 309, 316 (1975). By having opened the door to the staff opinion of Perkins State Hospital through cross-examination, appellant affirmatively waived objection. Peisner v. State, 236 Md. 137, 144 (1964), cert. denied, 379 U.S. 1001 (1965); Leuschner v. State, 41 Md. App. at 435-436 (1979).[10]

YES

- the polygraph examiner's testimony -

There is no testimony before the jury in the record relating to the polygraph examination. Akonom v. State, 40 Md. App. 676 (1978), cert. denied, 284 Md. 741 (1979), as relied upon by appellant, is totally inapposite. See also Mason v. State, ___ Md. App. ___ (No. 645, September Term, 1979, filed February 11, 1980). No issue was raised as to the coercive effect it may have had as a tool of interrogating to psychologically induce a confession. See Johnson v. State, 31 Md. App. 303 (1976).

---

[10] Appellant's complaint of "evidentiary and procedural rights" is not addressed by us because the two sentence attack provides neither argument, transcript reference nor legal authority to support it. Van Meter v. State, 30 Md. App. 406, 407-408 (1976), cert. denied, 278 Md. 737 (1976).

No

- prejudicial closing argument -

Appellant has waived any complaint he may have had to the closing argument by failing to object thereto. Holbrook v. State, 6 Md. App. 265, 270-271 (1969).

No

- individual voir dire -

Again, appellant's afterthoughts failed to preserve his complaint for review. His objection made at the conclusion of the trial, to failure of individual voir dire at the commencement of the trial, comes too late.

No

- instructions -

Appellant was not merely too late with objection to the instructions regarding the felony-murder law, he failed to enter one. This too waives his right to raise it on appeal. Md. Rule 757 f.

?

- sufficiency of the evidence -

Appellant's contentions in regard to evidentiary sufficiency are predicated upon our holding that the confessions and admissions were inadmissible. We have decided otherwise; the evidence was abundant. Jackson v. Virginia, supra.

- sufficiency of the indictment - NO

Appellant has waived the right to challenge the charging document by failure to comply with Md. Rule 736 a.

- the chicken or the egg - NO

Appellant contends that he was tried illegally on the "greater charges" relating to Troy Krause following their severance from the "lesser charges" relating to Rusty Marine. Again, appellant has waived this argument by failure to raise it below. Md. Rule 1085. Furthermore, we are not quite certain why, of these separate crimes, one is greater and the other lesser. The rationale of the case cited, Blackledge v. Perry, 417 U.S. 21 (1974), is, if apposite, lost to us.

- Md. Rule 746 - NO

Again, the question of compliance with Md. Rule 746 (or of a speedy trial right) was not made below and is waived here. The rule was only mandatory after July 25, 1979 in any case. State v. Hicks, 285 Md. 310, 336 (1979). Appellant was tried on June 19 and 20 of 1979.

NO

- competency of counsel -

We have traditionally held that competency of counsel is a question best left to post conviction procedures although we can review the record if it is propitiously raised and decided below. See Turner v. State, ___ Md. App. ___ (No. 772, September Term, 1979, filed March 10, 1980). Appellant voiced his complaint at the close of all the evidence and prior to instructions to the jury; however, even if the court having observed counsel's conduct could have made a valid judgment, all the facts were not in. In the first instance, how can one judge competency of counsel at that point until the case has been decided? Had the verdict been in appellant's favor, he would hardly have condemned success.

More practically, however, such an issue places the attorney on trial and the better practice is to permit him to explain whether the questioned judgments he has made were tactical or not. Furthermore, a trial judge as factfinder is then given an opportunity whether to believe such explanations. We will leave that issue for a procedure better equipped to decide it initially. White v. State, 17 Md. App. 58, 64 (1973), cert. denied, 268 Md. 754 (1973).

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

80-5084

RECEIVED
JUL 17 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT IN FORMA PAUPERIS
REVISED, FOR UNITED STATES COURTS ONLY

STATE OF MARYLAND
SS
CITY OF BALTIMORE

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AMENDED ITS LOCAL RULES 37 TO ELIMINATE THE REQUIREMENT THAT PETITIONS BY PRISONERS BE BY AFFIDAVIT. THE CHANGE IN THE RULE NOW PERMITS "VERIFICATION" WHEREFORE, Ellwood L. Leuschner, Sr., DECLARES IN DUE FORM OF LAW THAT:

1. HE IS THE ABOVE NAMED PETITIONER.

2. THE CLAIMS ALLEGED THEREIN ARE TRUE AND CORRECT TO THE BEST OF HIS KNOWLEDGE.

3. HE DEPOSES AND SAYS THAT HE IS A CITIZEN OF THE UNITED STATES OF AMERICA AND THAT HE IS UNABLE TO PAY THE COST OF SAID ACTIONS, OR GIVE SECURITY FOR SAME. WHEREFORE, HE PRAYS FORMA PAUPERIS PROCEEDINGS.

4. HE HAS BEEN INFORMED THAT FALSE SWEARING OR AFFIRMING CONSTITUTES THE CRIME OF PERJURY, TITLE 18 US CODE SECTION 1621, WHICH IS A FEDERAL FELONY AND IS PUNISHABLE BY A FINE OF NOT MORE THAN $2,000 OR IMPRISONMENT FOR NOT MORE THAN (5) FIVE YEARS, OR BOTH.

"UNDER PENALITIES OF PERJURY, I DECLARE THAT I HAVE EXAMINED THIS PETITION AND TO THE BEST OF MY KNOWLEDGE AND BELIEF, IT IS TRUE, CORRECT, AND COMPLETE."

Ellwood L. Leuschner, Sr.
SIGNATURE

July 14, 1980
DATE

RECEIVED
OCT 6 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-5084

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL COPY

OCTOBER TERM, 1980

ELLWOOD L. LEUSCHNER, SR.

Petitioner

v.

STATE OF MARYLAND

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS
Attorney General of Maryland

F. FORD LOKER
Assistant Attorney General

One S. Calvert Building
Baltimore, Maryland 21202
(301) 659-4091
Attorneys for Respondent

NO. 80-5084

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ELLWOOD L. LEUSCHNER, SR.

Petitioner

v.

STATE OF MARYLAND

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Did the trial court correctly admit Petitioner's custodial statements into evidence where the record indicates that they were voluntary in the traditional sense, in compliance with the Miranda decision and followed a lawful arrest?

2. Did the trial court correctly impose a life sentence without possibility of parole mandated by Md. Ann. Code, art. 27, § 643 B, where Petitioner's instant sentence is for the fourth separate unrelated period of imprisonment for conviction of a violent crime?

3. Did the trial court correctly permit a State's witness to testify about statements Petitioner volunteered to him because it in no way related to the polygraph examination of Petitioner?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....1

PRELIMINARY COMMENTS.....6

OPINION BELOW.....6

JURISDICTION OF THE COURT.....6

CONSTITUTIONAL PROVISIONS.....6

STATEMENT OF FACTS.....6

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI HAS NOT BEEN PRESENTED WITH ACCURACY, BREVITY AND CLEARNESS.....6

II. THE TRIAL COURT CORRECTLY ADMITTED PETITIONER'S CUSTODIAL STATEMENTS INTO EVIDENCE BECAUSE THE RECORD INDICATES THAT THEY WERE VOLUNTARY IN THE TRADITIONAL SENSE, IN COMPLIANCE WITH THE MIRANDA DECISION, AND FOLLOWED A LAWFUL ARREST.....7

III. THE ADMISSION INTO EVIDENCE OF THE SEVERAL STATEMENTS PETITIONER GAVE TO LAW ENFORCEMENT OFFICERS, EVEN IF ERROR, WAS HARMLESS BEYOND A REASONABLE DOUBT, BECAUSE THE SAME ADMISSIONS WERE RECEIVED INTO EVIDENCE THROUGH THE STATEMENTS PETITIONER MADE TO A PRIVATE CITIZEN, BETTY JEAN LARMORE, HIS GIRLFRIEND.....11

IV. THE TRIAL COURT CORRECTLY IMPOSED A LIFE SENTENCE WITHOUT POSSIBILITY OF PAROLE MANDATED BY MD. ANN. CODE, ART. 27, § 643B, WHERE PETITIONER'S INSTANT SENTENCE IS FOR THE FOURTH SEPARATE UNRELATED PERIOD OF IMPRISONMENT FOR CONVICTION OF A VIOLENT CRIME.....12

V. THE TRIAL JUDGE CORRECTLY ADMITTED THE TESTIMONY OF A STATE'S WITNESS ABOUT PETITIONER'S STATEMENTS TO HIM, BECAUSE IT IN NO WAY RELATED TO A POLYGRAPH EXAMINATION.....13

CONCLUSION.....14

TABLE OF CITATIONS

Cases

Akonom v. State, 40 Md. App. 676 (1978).....12

Calhoun v. Maryland, ___ Md. App. ___ (Sept. 9, 1980).....11

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....10

Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).....10

Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408 (1966).....9

Leuschner v. State, 41 Md. App. 423, 397 A.2d 622 (1979), cert. denied, 285 Md. 731 (1979), cert. denied, ___ U.S. ___ (Oct. 29, 1979).....7

Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424 (1966).....9

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).....6

North Carolina v. Butler, ___ U.S. ___, 60 L.Ed.2d 286 (1979).....7

Payton v. New York, ___ U.S. ___, 100 S.Ct. 1371 (1980).....8

Peisner v. State, 236 Md. 137 (1964), cert. denied, 379 U.S. 1001 (1965).....9

Rummel v. Estelle, ___ U.S. ___, 100 S.Ct. 1133 (1980).....11

Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967).....11

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).....8, 10

Statutes

Md. Ann. Code, Art. 27, § 28A.....8

Md. Ann. Code, Art. 27, § 643B.....1, 10, 11

28 U.S.C. § 1257 (3).....4

Rules

S.Ct. Rule 23(4).....5

Md. Rule 736.....8

Md. Rule 1085.....8

Constitutional Provisions

Constitution of the United States, Amendments V, VI, and XIV.....4, 9

PRELIMINARY COMMENTS

This brief in opposition to the petition for writ of certiorari is filed pursuant to the request of this Honorable Court, dated September 2, 1980.

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 45 Md. App. 323 (#945, Sept. Term, 1980, April 14, 1980). (Opinion attached as Respondent's Exhibit #1.) Petitioner filed a petition for writ of certiorari with issues identical to this one in the Court of Appeals of Maryland (Pet. Dkt. 176 of 1980), which was denied on July 3, 1980. (Order attached as Respondent's Exhibit #2.)

JURISDICTION OF THE COURT

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS

Petitioner has reproduced Amendments V, VI, and XIV to the Constitution of the United States in his petition for writ of certiorari. (Pet. at 1-2.)

STATEMENT OF FACTS

Respondent accepts the statements of the case and of facts presented by Petitioner. A detailed summary of the evidence at the trial level also appears at pages 8-25 of the slip opinion of the Court of Special Appeals of Maryland, attached as Respondent's Exhibit #1.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI HAS NOT BEEN PRESENTED WITH ACCURACY, BREVITY AND CLEARNESS.

Petitioner has filed a forty-five paged petition for writ of certiorari presenting three issues. Allowing the utmost consideration to Petitioner because he is proceeding in proper person, Respondent nevertheless avers that the petition's length

and rambling style is virtually unmanageable. For example, Petitioner devotes twenty-eight pages of Argument on question I, concerning whether his custodial statements were properly admitted at trial. The arguments include a digression into the alleged incompetency of his trial attorney, which Petitioner acknowledges (Pet. 13-14) was never presented or decided in the State courts and is inapplicable to his case in any event. Thereafter, Petitioner presents a confusing olio of allegations that his statements were the product of an illegal arrest, involuntary and in violation of Miranda. In a preface, he admits these issues turn largely upon the credibility of the witnesses.

This Court's Rule 23(4) declares:

> "The failure of a Petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

II.

THE TRIAL COURT CORRECTLY ADMITTED PETITIONER'S CUSTODIAL STATEMENTS INTO EVIDENCE BECAUSE THE RECORD INDICATES THAT THEY WERE VOLUNTARY IN THE TRADITIONAL SENSE, IN COMPLIANCE WITH THE MIRANDA DECISION, AND FOLLOWED A LAWFUL ARREST.

A. Voluntariness of statements.

Petitioner alleges at length that his decision to describe for the authorities the details of his kidnapping, and strangling to death the nine year old boy, Troy Krause, while performing sodomy upon the child was not voluntary because the conduct of the investigating officers unfairly overcame his will to remain silent.

Petitioner's complaint with the decision of the Court of Special Appeals of Maryland focuses upon its

> ". . . erroneous and blind acceptance of testimony from the witnesses, who, by their own words as recorded in the records, contradict, and present false statements from which the lower court derived their findings . . ." (Pet. at 13.)

The Court of Special Appeals of Maryland analyzed the voluminous record of the motion to suppress the statements of Petitioner where the trial court concluded that the testimony of the officers provided the credible version of events:

> "Quite frankly the court finds that the defendant's representations as to what happened, that is, with every breath he was asking for a lawyer is incredible and for it to be believed this court must believe that all those people who participated in the interrogation of this defendant were somehow mutually involved in some sort of conspiracy to violate his rights, which the court does not believe in this case." (T. 360).

Review of the opinion of the Court of Special Appeals of Maryland reveals strict and conscientious reliance upon the decisions of this Court on the voluntariness of confessions. Petitioner presents no novel issue, one left open or omitted by this Court. Therefore, it would not be useful or of national importance for this court to expend its resources reviewing a matter already reviewed by all levels of the Maryland judiciary.

B. Compliance with the Miranda decision.

Petitioner also argues that his confession to the crimes against young Troy Krause were received by the police without an adequate waiver of the rights listed in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). Again, this raises no more than a factual question, definitively put to rest by consulting the record of the suppression hearing.

The officers testified that Petitioner was given and waived the full text of the Miranda warnings prior to every occasion of questioning. Petitioner testified that he doggedly begged not to be questioned without a lawyer present. The trial judge, obviously in the superior position to weigh the credibility of the witnesses appearing before him, chose to credit the officer's evidence and to disbelieve Petitioner's. Petitioner's understandable unhappiness at not being believed may explain his continuing to protest his conviction but it adds no compelling

ground for re-reviewing the credibility question and the sufficiency of evidence question of the trial court proceedings.

The Court of Special Appeals of Maryland analyzed the facts surrounding the Miranda waiver and making of the statements according to the precepts announced by this Court in North Carolina v. Butler, ___ U.S. ___, 60 L.Ed.2d 286, 292 (1979). While Respondent does not dispute that there was a valid waiver by Petitioner's conduct, as in the Butler case, there additionally was ample support in the record for finding a written waiver of rights. The conduct about which Petitioner complains deals with events one, two and three days prior to the confession to the Troy Krause abduction, sodomy and murder.

On the day Petitioner confessed to the Krause killing, he executed a written Miranda waiver and confessed to the similar killing of another youth, Rusty Marine. See Leuschner v. State, 41 Md. App. 423, 397 A.2d 622 (1979), cert. denied, 285 Md. 731 (1979), cert. denied, ___ U.S. ___ (Oct. 29, 1979). The Marine confession, which was typed personally by Petitioner because he felt he could do it faster than the police, preceeded immediately Petitioner's admission to Ms. Larmore, his girlfriend, of the Krause killing and ensuing questions about it by the police.

Thus because the record supports that there was both a tacit and an express waiver of the Miranda rights preceding any police questioning and the challenged confessions, Petitioner has not presented an issue which calls for more than adjudging the sufficiency of evidence. As such, his petition is not worthy of review on a writ of certiorari.

C. Legality of arrest.

Petitioner concedes that his attack upon both the legality of his arrest as a California parole violator and the constitutionality of the State statute under which the arrest was made were not preserved for appellate review by timely objection, mandatory under State rules of criminal procedure. Md. Rules

736; 1085. (Pet. at 14). This Court has recognized the need for a State to regulate the means by which issues are developed in the trial court and preserved for later review:

> ". . . [T]hus the failure to timely object to its admission amouonted to an independent ground which would have prevented direct review here. See Henry v. Mississippi, 379 U.S. 633, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965)."

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977).

Even on the merits of Petitioner's contention, there is no basis for granting the certiorari petition. Petitioner primarily relies on the recent case of Payton v. New York (Nos. 78-5420 and 78-5421) ___ U.S. ___, 100 S.Ct. 1371 (1980), to prove his warrantless arrest by Maryland police officers as a fugitive from a California parole violation charge was illegal. The Payton case (and its companion, Riddick v. New York, reported as one decision) is inapposite.

In the instant case, the police did not use force to enter Petitioner's housetrailer and to make the arrest. When the officers announced their presence and purpose at the trailer door, Petitioner and his girlfriend consented to their entry and Petitioner accompanied the officers to the station for booking. He was anxious to have the parole matter "cleared up." (T. 28-32). In Payton, the gravamen of the complaint against the officers was their warrantless forcible entry. Id., ___ U.S. at ___, 100 S.Ct. at 1375.

The instant situation is factually dissimilar to Payton for another reason. Here, local police before the arrest had verified the pending California parole violation charge and the willingness of the California authorities to extradite Petitioner. Their conduct was in accord with Maryland statutes, to which no consttutional attack was made at trial. See Md. Ann. Code, art. 27, SS 28A, reproduced at (Pet. 3). Within hours of his arrival at the police station, Petitioner was taken before a

magistrate for presentment on the fugitive charge (T. 131-38).

In summary, none of the three bases relied upon by Petitioner for securing review of his confessions on a writ of certiorari presents a novel or undecided issue of law, or one of national impact or interest. Rather, his contentions are distilled mainly to a question of sufficiency of evidence and credibility of witnesses.

III.

THE ADMISSION INTO EVIDENCE OF THE SEVERAL STATEMENTS PETITIONER GAVE TO LAW ENFORCEMENT OFFICERS, EVEN IF ERROR, WAS HARMLESS BEYOND A REASONABLE DOUBT, BECAUSE THE SAME ADMISSIONS WERE RECEIVED INTO EVIDENCE THROUGH THE STATEMENTS PETITIONER MADE TO A PRIVATE CITIZEN, BETTY JEAN LARMORE, HIS GIRLFRIEND.

Even assuming, arguendo, that the admissions which Petitioner made to law enforcement officers should have been suppressed that error would be harmless beyond a reasonable doubt. There was evidence at trial from his girlfriend, Betty Jean Larmore, that Petitioner admitted killing young Troy Krause and burying the corpse on the Zimmerman farm (T. 49-51, 55). These statements were not the product of custodial interrogation by law enforcement personnel. Therefore, they were not subject to suppression for alleged violations of Petitioner's federal constitutional rights, regardless of the ruling with respect to the conduct of police officers. Only statements involving government agents fall within the ambit of the Fifth and Sixth Amendments. Statements to private citizens, even to those who later become witnesses for the prosecution, are not subject to the exclusionary rule of the federal Constitution. See, e.g., Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408 (1966); Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424 (1966).

Under Maryland procedure, where the same or similar evidence is properly introduced through one witness, any error in its introduction through an improper witness becomes harmless. Peisner v. State, 236 Md. 137, 144 (1964), cert. denied, 379 U.S.

1001 (1965). Thus Wainwright v. Sykes, 97 S.Ct. at 2506, prevents direct review at the Supreme Court level.

Accordingly, the confession questions Petitioner attempts to raise, even if they relate to constitutional protections, are not worthy of review by writ of certiorari because even were Petitioner to prevail, the errors would be deemed harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824-827, 17 L.Ed.2d 705 (1967); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

The harmless error consideration is particularly compelling in the instant case, where the defense at trial was narrowed to the question of Petitioner's insanity, not the inadequacy of proof of the corpus delicti, or his criminal agency. Petitioner made no argument to the jury that his challenged confessions to the police officers were involuntary. The content of those confessions, indicating the savagery and brutality of the acts committed upon the nine year old victim, Troy Krause, were helpful in Petitioner's approach to the jury that no sane man could have acted as he did at the time the offenses were committed. (T. 319-35).

IV.

THE TRIAL COURT CORRECTLY IMPOSED A LIFE SENTENCE WITHOUT POSSIBILITY OF PAROLE MANDATED BY MD. ANN. CODE, ART. 27, § 643B, WHERE PETITIONER'S INSTANT SENTENCE IS FOR THE FOURTH SEPARATE UNRELATED PERIOD OF IMPRISONMENT FOR CONVICTION OF A VIOLENT CRIME.

Petitioner next argues that his sentence of life imprisonment without parole was not imposed in conformity with Md. Ann. Code, art. 27, § 643B (reproduced at Pet. 2-3). Before sentencing it was agreed that Petitioner had been imprisoned for a California rape conviction in 1953, a California rape conviction in 1965 (the offense which formed the basis for his fugitive status as a parole violator), and a Maryland conviction for first degree murder in 1978 (the prior, unrelated killing of Rusty Marine).

The instant sentence was imposed well after Petitioner had commenced serving the term for the Marine murder and was consecutive to that term. Thus, under the terms of the Maryland statute, Petitioner shall have served three prior, separate periods of incarceration for convictions of violent crimes at the time he embarks upon the instant sentence. This court's decision in Spencer v. Texas, 385 U.S. 554, 566, 87 S.Ct. 648, 655, 17 L.Ed.2d 606 (1967), has upheld a State's prerogative of enacting statutes to punish violent recidivists such as Petitioner. See, also, Rummel v. Estelle, ___ U.S. ___, 100 S.Ct. 1133, 1139 (1980), where the Texas statute mandating life imprisonment upon the fourth felony conviction was upheld even where those "felonies" involved relatively minor, and non-violent property crimes. The argument presented in the "amendment" to the Petition, based upon case of Calhoun v. Maryland, ___ Md. App. ___ (Sept. 9, 1980), is equally unavailing. The error of the lower court in Calhoun was in imposing four consecutive sentences without parole, instead of one, as permitted by art. 27, § 643B. The statute limited the term in Calhoun's case to 25 years; yet by adding consecutive sentences, to the one proper sentence, a total of 50 years was incorrectly accumulated for related convictions arising from the same criminal transaction.

V.

THE TRIAL JUDGE CORRECTLY ADMITTED THE TESTIMONY OF A STATE'S WITNESS ABOUT PETITIONER'S STATEMENTS TO HIM, BECAUSE IT IN NO WAY RELATED TO A POLYGRAPH EXAMINATION.

Petitioner's final question is unworthy of review on a writ of certiorari because it is unsupported by the trial record. As that record indicates, the testimony of Sgt. Griffith, the State Police polygraph examiner, in no way related to the polygraph examination, which Petitioner had requested in order to aid him in recalling where he had buried Troy Krause (T. 73-79). Since the scope of the examination in no way involved the polygraph examination, there is no factual basis to support the allegation

that the case of Akonom v. State, 40 Md. App. 676 (1978), is involved.

Petitioner apparently misapprehends the gist of the Akonom rule. Whereas the results of polygraph examinations (i.e., that the accused stated X, Y and Z, which the polygraph instrument registered as either truthful or false), are not considered reliable enough to be admissible in Maryland courts, the conversations a person has with the officer who happens also to be a polygraph interpreter are as admissible as any other voluntary statement to a law officer. The evidence here related to this latter case, where the examination results were not involved.

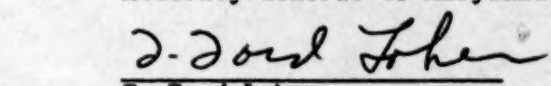
This evidence, even if erroneously admitted, would have been harmless beyond a reasonable doubt for the reasons and upon the legal authorities presented hereinabove.

CONCLUSION

For the reasons stated, Respondent respectfully requests tht this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

STEPHEN H. SACHS
Attorney General of Maryland



F. Ford Loker
Assistant Attorney General

Attorneys for Respondent